The Guide - Volume 3 Back to Graphical Site

EXHIBIT B-1: ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY

Preface to the Rules

Section 372(c) of title 28 of the United States Code provides a way for any person to complain about a federal judge who the person believes "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" or "is unable to discharge all the duties of office by reason of mental or physical disability." It also permits the judicial councils of the circuits to adopt rules for the consideration of these complaints. These rules have been adopted under that authority.

Complaints are filed with the clerk of the court of appeals on a form that has been developed for that purpose. Each complaint is referred first to the chief judge of the circuit, who decides whether the complaint raises an issue that should be investigated. (If the complaint is about the chief judge, another judge will make this decision; see rule 18(f).)

The chief judge will dismiss a complaint if it does not properly raise a problem that is appropriate for consideration under section 372(c). The chief judge may also conclude the complaint proceeding if the problem has been corrected or if intervening events have made action on the complaint unnecessary. If the complaint is not disposed of in either of these two ways, the chief judge will appoint a special committee to investigate the complaint. The special committee makes its report to the judicial council of the circuit, which decides what action, if any, should be taken. The judicial council is a body that consists of judges of the court of appeals and district judges.

The rules provide, in some circumstances, for review of decisions of the chief judge or the judicial council.

Chapter 1: Filing a Complaint

RULE 1. WHEN TO USE THE COMPLAINT PROCEDURE
RULE 2. HOW TO FILE A COMPLAINT
RULE 3. ACTION BY CLERK OF COURT OF APPEALS UPON RECEIPT OF A COMPLAINT

Chapter 2: Review of a Complaint by the Chief Judge

RULE 4. REVIEW BY THE CHIEF JUDGE

Chapter 3: Review of Chief Judge's Disposition of a Complaint

RULE 5. PETITION FOR REVIEW OF CHIEF JUDGE'S DISPOSITION
RULE 6. HOW TO PETITION FOR REVIEW OF A DISPOSITION BY THE CHIEF JUDGE
RULE 7. ACTION BY CLERK OF COURT OF APPEALS UPON RECEIPT OF A PETITION FOR REVIEW
RULE 8. REVIEW BY THE JUDICIAL COUNCIL OF A CHIEF JUDGE'S ORDER

Chapter 4: Investigation and Recommendation by Special Committee

RULE 9. APPOINTMENT OF SPECIAL COMMITTEE
RULE 10. CONDUCT OF AN INVESTIGATION
RULE 11. CONDUCT OF HEARINGS BY SPECIAL COMMITTEE
RULE 12. RIGHTS OF JUDGE IN INVESTIGATION
RULE 13. RIGHTS OF COMPLAINANT IN INVESTIGATION

Chapter 5: Judicial Council Consideration of Recommendations of Special Committee

RULE 14. ACTION BY JUDICIAL COUNCIL
RULE 15. PROCEDURES FOR JUDICIAL COUNCIL CONSIDERATION OF A SPECIAL COMMITTEE'S REPORT

Chapter 6: Miscellaneous Rules

RULE 16. CONFIDENTIALITY
RULE 17. PUBLIC AVAILABILITY OF DECISIONS
RULE 18. DISQUALIFICATION
RULE 19. WITHDRAWAL OF COMPLAINTS AND PETITIONS FOR REVIEW
RULE 20. AVAILABILITY OF OTHER PROCEDURES
RULE 21. AVAILABILITY OF RULES AND FORMS
RULE 22. EFFECTIVE DATE
RULE 23. ADVISORY COMMITTEE

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The Guide - Volume 3 Back to Graphical Site

EXHIBIT B-1: ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY

Chapter 1: Filing a Complaint

RULE 1. WHEN TO USE THE COMPLAINT PROCEDURE

(a) Purpose of the procedure. The purpose of the complaint procedure is to improve the administration of justice in the federal courts by taking action when judges have engaged in conduct that does not meet the standards expected of federal judicial officers or are physically or mentally unable to perform their duties. The law's purpose is essentially forward-looking and not punitive. The emphasis is on correction of conditions that interfere with the proper administration of justice in the courts.

(b) What may be complained about. The law authorizes complaints about United States circuit judges, district judges, bankruptcy judges, or magistrate judges who have "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" or who are "unable to discharge all the duties of office by reason of mental or physical disability."

"Conduct prejudicial to the effective and expeditious administration of the business of the courts" is not a precise term. It includes such things as use of the judge's office to obtain special treatment for friends and relatives, acceptance of bribes, improperly engaging in discussions with lawyers or parties to cases in the absence of representatives of opposing parties, and other abuses of judicial office. It does not include making wrong decisions _____ even very wrong decisions _____ in cases. The law provides that a complaint may be dismissed if it is "directly related to the merits of a decision or procedural ruling."

"Mental or physical disability" may include temporary conditions as well as permanent disability.

(c) Who may be complained about. The complaint procedure applies to judges of the United States courts of appeals, judges of United States district courts, judges of United States bankruptcy courts, and United States magistrate judges. These rules apply, in particular, only to judges of the Court of Appeals for the th Circuit and to district judges, bankruptcy judges, and magistrate judges of federal courts within the circuit. The circuit includes [list states and other jurisdictions].

Complaints about other officials of federal courts should be made to their supervisors in the various courts. If such a complaint cannot be satisfactorily resolved at lower levels, it may be referred to the chief judge of the court in which the official is employed. The circuit executive, whose address is , is sometimes able to provide assistance in resolving such complaints.

(d) Time for filing complaints. A complaint may be filed at any time. However, complaints should be filed promptly. A complaint may be dismissed if it is filed so long after the events in question that the delay will make fair consideration of the matter impossible. A complaint may also be dismissed if it does not indicate the existence of a current problem with the administration of the business of the courts.

(e) Limitations on use of the procedure. The complaint procedure is not intended to provide a means of obtaining review of a judge's decision or ruling in a case. The judicial council of the circuit, the body that takes action under the complaint procedure, does not have the power to change a decision or ruling. Only a court can do that.

The complaint procedure may not be used to have a judge disqualified from sitting on a particular case. A motion for disqualification should be made in the case.

Also, the complaint procedure may not be used to force a ruling on a particular motion or other matter that has been before the judge too long. A petition for mandamus can sometimes be used for that

purpose.

(f) Abuse of the complaint procedure. A complainant who has filed vexatious, repetitive, harassing, or frivolous complaints, or has otherwise abused the complaint procedure, may be restricted from filing further complaints. After affording the offending complainant an opportunity to show cause in writing why his or her ability to file further complaints should not be limited, the judicial council may restrict or impose conditions upon the complainant's use of the complaint procedure. Upon written request of the complainant, the judicial council may revise or withdraw any restrictions or conditions imposed.

Commentary on Rule 1

Advice to Prospective Complainants on Use of the Complaint Procedure

As at least some members of Congress anticipated, a great many of the complaints that have been filed under section 372(c) have been filed by litigants disappointed in the outcomes of their cases.(1) Some complaints allege nothing more than that the decision was in violation of established legal principles. Many of them allege that the judges are members of conspiracies to deprive the complainants of their rights, and offer the substance of the judicial decision as the only evidence of the conspiratorial behavior. A great many of the complaints seek various forms of relief in the underlying litigation.

Rule 1 is intended to provide prospective complainants with guidance about the appropriate uses of the complaint procedure. Paragraph (b) discusses cognizable subject matters, and paragraph (c) discusses cognizable persons. Paragraph (e) discusses remedies, and attempts to make it clear that the circuit council will not provide relief from a ruling or judgment of a court. It is hoped that such guidance will reduce the number of complaints filed that seek relief that cannot be given under the statute or deal with matters that are plainly not cognizable. However, we recognize that many who should be deterred will not be.

The last two paragraphs in rule 1(e), dealing with complaints alleging bias and those alleging undue delay, are in accord with judicial council decisions in some circuits. Where actions of the council have settled questions about the use of the complaint procedure in these situations, it seems appropriate to use the rules to inform prospective complainants about what they may expect.

The use of the complaint procedure is not limited to cases in which a judge has committed an impropriety. The phrase "conduct prejudicial to the effective and expeditious administration of the business of the courts" is derived from 28 U.S.C. § 332(d)(1), and we do not understand the phrase to be limited to conduct that is unethical or corrupt. While we have not made an effort to define the phrase with any precision, we note that habitual failure to decide matters in a timely fashion is widely regarded as the proper subject of a complaint. Delay in a single case may be a proper subject for a complaint only in unusual cases, such as where the delay is improperly motivated or is the product of improper animus or prejudice toward a particular litigant, or, possibly, where the delay is of such an extraordinary or egregious character as to constitute a clear dereliction of judicial responsibilities suitable for discipline.

Venue

Rule 1(c) states that the complaint procedure applies to judges "of federal courts within the circuit." This language is intended to make it clear that the circuit in which a judge holds office is the appropriate circuit in which to file a complaint.

The rules of several circuits apply to judges "serving in the circuit." It is not clear whether this language was intended by its draftsmen to allow a complaint based on alleged misconduct of a visiting judge to be filed in the circuit in which the conduct occurred. In any event, rule 1(c) reflects the view that complaints should be filed in the circuits in which judges hold office, regardless of where any alleged misconduct took place.

This is an issue on which uniformity of circuit rules is probably more important than the particular result reached: If a complaint is based on the conduct of a judge who is visiting outside the home circuit, one and only one circuit chief judge should be authorized to consider the complaint. The absence of uniformity on this issue raises the possibility that neither chief judge would accept responsibility, or, at the other extreme, that both would.

Our preference for putting venue in the circuit in which the judge holds office is largely based on the administrative perspective of the act. If it were regarded as appropriate for a litigant to seek relief through the complaint procedure from alleged bias or from allegedly undue delay in handling a particular matter (as contrasted with habitual failure to make timely decisions), the case would be strong for putting venue in the circuit in which the litigation is located. From the administrative viewpoint, however, with its emphasis on the future conduct of the business of the courts, the circuit in which the judge holds office is clearly more appropriate. That circuit is much more likely to be able to influence a judge's future behavior in constructive ways. While there is some logic in saying that a particular circuit council is the appropriate body for considering complaints about the administration of justice in that circuit, that logic is outweighed by the greater opportunity of the home circuit to fashion appropriate remedies.

Complaints Against Other Officials

The second paragraph of rule 1(c) reflects a concern that the public be given some guidance about how to pursue grievances about court officials other than judges. A circuit council may wish to modify this paragraph to make it conform with the circuit's own internal procedures, but there should be some guidance about where such a complaint may be taken.

The invitation in the last sentence of the paragraph to seek assistance from the circuit executive is, of course, related to the circuit executive's special relationship with the circuit council, which under 28 U.S.C. § 332(d)(1) would have authority to act on evidence of improper behavior by a court employee. We note in this connection that some complaints have been filed under section 372(c) in which a chief judge is complained against for failing to take action to correct deficiencies of subordinate personnel. Assuming that they cannot get satisfaction in the court in which someone is employed, it seems preferable that people take complaints about nonjudicial personnel directly to the circuit executive.

Time Limitation

These rules do not contain a time limit for the filing of a complaint. However, rule 1(d) indicates that a complaint may be dismissed, for reasons analogous to laches, if the delay in filing the complaint would prejudice the ability of the judicial council to give fair consideration to the matter. This approach seems fully consonant with the congressional intent underlying the 1990 amendment to 28 U.S.C. § 372(c)(11)[2] that no rule shall limit the time period within which a complaint may be filed. As the report of the House Judiciary Committee upon this amendatory legislation stated:

Subsection 101(e) [of H.R. 1620] amends this statutory framework by narrowing the rule-making power of the circuit councils so that a council cannot create a statute of limitations. Statutes of limitations, which are substantive in nature and not procedural, are for the Congress to make and not for the rulemakers. However, *dismissal _ on a case-by- case basis _ may be appropriate, considering the individual equities involved*. [Emphasis supplied.] H.R. Rep. No. 101-512, 101st Cong., 2d Sess. 20 (1990).

[1] *See* 125 Cong. Rec. 30,093-94 (1979) (remarks of Sen. Bellmon); 126 Cong. Rec. 28,091 (1980) (remarks of Sen. DeConcini); H.R. Rep. No. 1313, 96th Cong., 2d Sess. 18-19 (1980).

[2] Judicial Discipline and Removal Reform Act of 1990, Public Law No. 101-650, title IV, § 402(e), 104 Stat. 5089, 5123.

Last Modified - Thursday Jan 02, 2003

Back to Graphical Site

The Guide - Volume 3

EXHIBIT B-1: ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY

Chapter 1: Filing a Complaint

RULE 2. HOW TO FILE A COMPLAINT

(a) Form. Complaints should be filed on the official form for filing complaints in the th Circuit, which is reproduced in the appendix to these rules. Forms may be obtained by writing or telephoning the clerk of the Court of Appeals for the th Circuit, [address and telephone number]. Forms may be picked up in person at the office of the clerk of the court of appeals or any district court or bankruptcy court within the circuit.

(b) Statement of facts. A statement should be attached to the complaint form, setting forth with particularity the facts that the claim of misconduct or disability is based on. The statement should not be longer than five pages (five sides), and the paper size should not be larger than the paper the form is printed on. Normally, the statement of facts will include:

(1) a statement of what occurred;

(2) the time and place of the occurrence or occurrences;

(3) any other information that would assist an investigator in checking the facts, such as the presence of a court reporter or other witness and their names and addresses.

(c) Legibility. Complaints should be typewritten if possible. If not typewritten, they must be legible.

(d) Submission of documents. Documents such as excerpts from transcripts may be submitted as evidence of the behavior complained about; if they are, the statement of facts should refer to the specific pages in the documents on which relevant material appears.

(e) Number of copies. If the complaint is about a single judge of the court of appeals, three copies of the complaint form, the statement of facts, and any documents submitted must be filed. If it is about a single district judge or magistrate judge, four copies must be filed; if about a single bankruptcy judge, five copies. If the complaint is about more than one judge, enough copies must be filed to provide one for the clerk of the court, one for the chief judge of the circuit, one for each judge complained about, and one for each judge to whom the clerk must send a copy under rule 3(a)(2).

(f) Signature and oath. The form must be signed and the truth of the statements verified in writing under oath. As an alternative to taking an oath, the complainant may declare under penalty of perjury that the statements are true. The complainant's address must also be provided.

(g) Anonymous complaints. Anonymous complaints are not handled under these rules. However, anonymous complaints received by the clerk will be forwarded to the chief judge of the circuit for such action as the chief judge considers appropriate. See rules 2(j) and 20.

(h) Where to file. Complaints should be sent to:

Clerk, United States Court of Appeals [address].

The envelope should be marked "Complaint of Misconduct" or "Complaint of Disability." The name of the judge complained about should *not* appear on the envelope.

(i) No fee required. There is no filing fee for complaints of misconduct or disability.

(j) Chief judge's authority to initiate complaint. In the interest of effective and expeditious administration of the business of the courts and on the basis of information available to the chief judge of the circuit, the chief judge may, by written order stating reasons therefor, identify a complaint as authorized by 28 U.S.C. § 372(c)(1) and thereby dispense with the filing of a written complaint. A chief judge who has identified a complaint under this rule will not be considered a complainant and, subject to the second sentence of rule 18(a), will perform all functions assigned to the chief judge under these rules for the determination of complaints filed by a complainant.

Commentary on Rule 2

Use of Complaint Form

Paragraph (a) of rule 2 provides that complaints be filed on a form. Use of a complaint form is proposed for two reasons.

First, a complaint form provides a simple means of eliciting some fairly standard information that is helpful in administering the act.

Second, the use of a complaint form will resolve ambiguities that sometimes arise about whether the author of a complaining letter intends to invoke the procedures of section 372(c). With the use of the form, the 372(c) procedure will be used only if the complainant clearly invokes it.

Limitation on Length of Complaint

Paragraph (b) of rule 2 provides a five-page limit on the statement of facts. Paragraph (d), however, does not restrict the volume of documents that may be submitted as evidence of the behavior complained about.

The existing rules of most circuits do not contain restrictions on the length of complaints other than a reference to the statutory "brief statement of the facts." However, circuits that prescribe complaint forms require that the statement of facts fit on the form. They permit the use of reverse sides of the pages of the form but do not permit additional pages, and their rules state that consideration will ordinarily be given only to "those matters . . . set forth on the forms provided" and that incorporating other documents by reference may result in dismissal of the complaint.

Rule 2(b) attempts to steer a middle course. On the one hand, it is hoped that a five-page limit will get rid of the long, rambling complaints that do not clearly identify the conduct complained of. On the other hand, it is hoped that such a limit will not unduly restrict the ability to communicate the facts supporting a complaint. In that connection, we are conscious of the fact that the statute calls for fact pleading rather than notice pleading, and that adequate space must be permitted for a complainant to make a factual presentation about a pattern of alleged misconduct.

The provision allowing submission of documentary evidence is partly motivated by our concern that a complainant not be unduly restricted in presenting the factual basis of the complaint, but also reflects a sense that prohibiting the submission of documents with the complaint tends to make the procedure unnecessarily complex. In many cases, a chief judge will have to ask for documents if they haven't been submitted. In a complaint about abusive conduct on the bench, for example, it is hard to imagine that the chief judge would not wish to see the transcript.

Complaints Against More than One Judicial Officer

Although some circuits require a separate complaint for each judicial officer complained about, we are not persuaded of the desirability of that approach. The basic justification for it appears to be that it may force a prospective complainant to focus on the need to address the conduct of each particular judicial officer separately. We doubt that any impact it may have along these lines would justify the increase in paperwork.

Oath or Declaration

Rule 2(f) includes a requirement that complaints be signed and verified under oath or declaration. While this requirement is probably not of the greatest importance, it may deter occasional abuse of the complaint process. In view of the ease with which a complainant can make a declaration under penalty of perjury, the requirement should not be burdensome. As is indicated below, we have independently concluded that anonymous complaints should not be handled under the section 372(c) procedure; the requirement of an oath or declaration would be inconsistent with a policy of accepting such complaints.

Under 28 U.S.C. § 1746, any statement required by rule to be made under an oath in writing may be subscribed instead with a written declaration under penalty of perjury that the statement is true and correct. 18 U.S.C. § 1621 includes in the definition of perjury a willfully false statement subscribed pursuant to 18 U.S.C. § 1746. There is some question about the authority of a circuit council simply to require a declaration under penalty of perjury, not made in lieu of an oath. To avoid this technical problem, rule 2(f) prescribes an oath but informs prospective complainants of the availability of the alternative. The complaint form permits either method.

Anonymous Complaints

Whether an anonymous complaint should be accepted is a question of some difficulty. On the one hand, section 372(c) clearly contemplates a complainant whose identity and address are known and who therefore can receive notice of decisions taken, be offered the opportunity to appear at proceedings of a special committee, and be accorded the opportunity to petition for review if dissatisfied with the disposition of the complaint. On the other hand, a prohibition against anonymous complaints may effectively bar complaints from the two groups of citizens most likely to have knowledge of serious problems in the administration of justice: lawyers and court employees.

The resolution reflected in rule 2(g) is to require that complaints under section 372(c) be signed but to make it clear that chief judges, as chairmen of the circuit judicial councils, can, just as they always have, consider information from any source, anonymous or otherwise. This solution is consistent with congressional expressions of intention that informal methods of resolving problems, traditionally used under section 332, should continue to be used in many cases.(3) Hence, under these rules, the formalities of the statute would not be invoked by an anonymous complaint, but the chief judge and the circuit council may nevertheless consider it. Information obtained from an anonymous complaint could also provide a basis for identification of a complaint by the chief judge under rule 2(j).

Identification of Complaints

Section 372(c)(1), as amended by section 402(a) of the Judicial Discipline and Removal Reform Act of 1990, authorizes the chief judge, by written order stating reasons therefor, to identify a complaint and thereby dispense with the filing of a written complaint. Commentators have asserted that this provision was enacted in response to the experience of one of the circuits where, following a judge's conviction of a crime, the judicial council initially took no action because no complaint had been filed against the judge.(4) To avoid problems of this nature, section 372(c)(1) now makes it clear that the chief judge may identify a complaint and thereby bring the disciplinary mechanisms of section 372 into play in the absence of the filing of a written complaint.

Congress has expressed the intention that "[i]n exercising this discretion [to identify a complaint], the chief judge must enter a written order explaining the reasons for waiving the written complaint requirement and must further identify the complaint."(5) Because the identification of a complaint is within the discretion of the chief judge, it is anticipated that a chief judge's failure to identify a complaint will not ordinarily constitute a proper basis for the filing of a complaint of misconduct against the chief judge under section 372.

Rule 2(j) provides that once the chief judge has identified a complaint, the chief judge (subject to the disqualification provisions of rule 18(a)) will perform all functions assigned to the chief judge for the determination of complaints filed by a complainant. Rule 2(j) contemplates, therefore, that the

identification of a complaint by the chief judge will advance the process no further than would the filing of a complaint by a complainant. Once a complaint has been identified, it will be treated in a manner identical to a filed complaint under these rules. Thus, for example, under rule 4(e) a special committee ordinarily will not be appointed to investigate an identified complaint until the judge who is the subject of the complaint has been invited to respond to the complaint and has been allowed a reasonable time to do so. Similarly, under rule 4 the chief judge has the same options in the investigation and determination of an identified complaint that the chief judge would have had if the complaint had been filed.

(3) *See* S. Rep. No. 362, 96th Cong., 1st Sess. 3-4, 6 (1979); 126 Cong. Rec. 28,092 (1980) (remarks of Sen. DeConcini on final passage).

(4) Kastenmeier, Rep. Robert W., and Remington, Michael J., *Judicial Discipline: A Legislative Perspective*, 76 Ky. L.J. 763, 781-82 (1988).

(5) H.R. Rep. No. 512, 101st Cong., 2d Sess. 18 (1990).

Last Modified - Thursday Jan 02, 2003

Back to Graphical Site

The Guide - Volume 3
EXHIBIT B-1: ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY
Chapter 1: Filing a Complaint

RULE 3. ACTION BY CLERK OF COURT OF APPEALS UPON RECEIPT OF A COMPLAINT

(a) Receipt of complaint in proper form.

(1) Upon receipt of a complaint against a judge filed in proper form under these rules, the clerk of the court of appeals will open a file, assign a docket number, and acknowledge receipt of the complaint. The clerk will promptly send copies of the complaint to the chief judge of the circuit (or the judge authorized to act as chief judge under rule 18(f)) and to each judge whose conduct is the subject of the complaint. The original of the complaint will be retained by the clerk.

Upon the issuance of an order by the chief judge identifying a complaint under rule 2(j), the clerk will thereafter expeditiously process such complaint as otherwise provided by these rules.

(2) If a district judge or magistrate judge is complained about, the clerk will also send a copy of the complaint to the chief judge of the district court in which the judge or magistrate judge holds his or her appointment. If a bankruptcy judge is complained about, the clerk will send copies to the chief judges of the district court and the bankruptcy court. However, if the chief judge of a district court or bankruptcy court is a subject of the complaint, the chief judge's copy will be sent to the judge of such court in regular active service who is most senior in date of commission among those who are not subjects of the complaint.

(b) Receipt of complaint about official other than a judge of the th Circuit. If the clerk receives a complaint about an official other than a judge of the th Circuit, the clerk will not accept the complaint for filing and will advise the complainant in writing of the procedure for processing such complaints.

(c) Receipt of complaint about a judge of the th Circuit and another official. If a complaint is received about a judge of the th Circuit and another official, the clerk will accept the complaint for filing only with regard to the judge, and will advise the complainant accordingly.

(d) Receipt of complaint not in proper form. If the clerk receives a complaint against a judge of this circuit that uses the complaint form but does not comply with the requirements of rule 2, the clerk will normally not accept the complaint for filing and will advise the complainant of the appropriate procedures. If a complaint against a judge is received in letter form, the clerk will normally not accept the letter for filing as a complaint, will advise the writer of the right to file a formal complaint under these rules, and will enclose a copy of these rules and the accompanying forms.

Commentary on Rule 3

Role of Staff Other than the Clerk

Rule 2(h) follows the statutory language and provides that complaints are to be filed with the clerk of the court of appeals. The statute also directs the clerk to transmit copies of a complaint to the chief judge and to the judge complained of (reflected in rule 3(a)) and states that certain council orders will be made public through the clerk's office.

Except for these limited provisions, the statute does not allocate responsibilities among clerks and other personnel, and the circuits are free to assign tasks as they see fit. While these rules are based on the assumption that the clerk will continue to maintain the files, will receive petitions for review of chief judge orders, and perform similar functions, individual circuits may wish to make other assignments. In that case, rule 3 could be modified to instruct the clerk to transmit the file to the circuit

executive or other official after having performed the statutorily mandated duties.

Distribution of Complaint to Chief Judge of District Court or Bankruptcy Court

The statute requires that the complaint be transmitted to the chief judge of the circuit and the judge complained about. If the complaint is about a district judge, bankruptcy judge, or magistrate judge, rule 3(a)(2) requires in addition that a copy be transmitted to the chief judge of the district court and, where a bankruptcy judge is the subject, the chief judge of the bankruptcy court. This provision is included in recognition of the responsibility of every chief judge for the administration of his or her court.

Last Modified - Thursday Jan 02, 2003

Back to Graphical Site

The Guide - Volume 3

EXHIBIT B-1: ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY

Chapter 2: Review of a Complaint by the Chief Judge

RULE 4. REVIEW BY THE CHIEF JUDGE

(a) Purpose of chief judge's review. When a complaint in proper form is sent to the chief judge by the clerk's office, the chief judge will review the complaint to determine whether it should be (1) dismissed, (2) concluded on the ground that corrective action has been taken, (3) concluded because intervening events have made action on the complaint no longer necessary, or (4) referred to a special committee.

(b) Inquiry by chief judge. In determining what action to take, the chief judge may conduct a limited inquiry for the purpose of determining (1) whether appropriate corrective action has been or can be taken without the necessity for a formal investigation, (2) whether intervening events have made action on the complaint unnecessary, and (3) whether the facts stated in the complaint are either plainly untrue or are incapable of being established through investigation. For this purpose, the chief judge may request the judge whose conduct is complained of to file a written response to the complaint. The chief judge may also communicate orally or in writing with the complainant, the judge whose conduct is complained of, and other people who may have knowledge of the matter, and may review any transcripts or other relevant documents. The chief judge will not undertake to make findings of fact about any matter that is reasonably in dispute.

(c) Dismissal. A complaint will be dismissed if the chief judge concludes:

(1) that the claimed conduct, even if the claim is true, is not "conduct prejudicial to the effective and expeditious administration of the business of the courts" and does not indicate a mental or physical disability resulting in inability to discharge the duties of office;

(2) that the complaint is directly related to the merits of a decision or procedural ruling;

(3) that the complaint is frivolous, a term that includes making charges that are wholly unsupported or alleging facts that are shown by a limited inquiry pursuant to rule 4(b) to be either plainly untrue or incapable of being established through investigation; or

(4) that, under the statute, the complaint is otherwise not appropriate for consideration.

(d) Corrective action. The complaint proceeding will be concluded if the chief judge determines that appropriate action has been taken to remedy the problem raised by the complaint or that action on the complaint is no longer necessary because of intervening events.

(e) Appointment of special committee. If the complaint is not dismissed or concluded, the chief judge will promptly appoint a special committee, constituted as provided in rule 9, to investigate the complaint and make recommendations to the judicial council. However, ordinarily a special committee will not be appointed until the judge complained about has been invited to respond to the complaint and has been allowed a reasonable time to do so. In the discretion of the chief judge, separate complaints may be joined and assigned to a single special committee; similarly, a single complaint about more than one judge may be severed and more than one special committee appointed.

(f) Notice of chief judge's action.

(1) If the complaint is dismissed or the proceeding concluded on the basis of corrective action taken or because intervening events have made action on the complaint unnecessary, the chief judge will prepare a supporting memorandum that sets forth the allegations of the complaint and the reasons for the disposition. The memorandum will not include the name of the

complainant or of the judge whose conduct was complained of. The order and the supporting memorandum will be provided to the complainant, the judge, and any judge entitled to receive a copy of the complaint pursuant to rule 3(a)(2). The complainant will be notified of the right to petition the judicial council for review of the decision and of the deadline for filing a petition.

(2) If a special committee is appointed, the chief judge will notify the complainant, the judge whose conduct is complained of, and any judge entitled to receive a copy of the complaint pursuant to rule 3(a)(2) that the matter has been referred, and will inform them of the membership of the committee.

(g) Public availability of chief judge's decision. Materials related to the chief judge's decision will be made public at the time and in the manner set forth in rule 17.

(h) Report to the judicial council. The chief judge will from time to time report to the judicial council of the circuit on actions taken under this rule.

(i) Allegations of criminal conduct. If a chief judge dismisses, solely for lack of jurisdiction under 28 U.S.C. § 372(c), non-frivolous allegations of criminal conduct by a judge, the chief judge's order of dismissal shall inform the complainant that the dismissal does not prevent the complainant from bringing any allegation of criminal conduct to the attention of appropriate federal or state criminal authorities. If, in this situation, the allegations of criminal conduct were originally referred to the circuit by a Congressional committee or member of Congress, the chief judge - if no petition for review of the dismissal is filed within the thirty-day period specified by rule 6(a) - shall notify the Congressional committee or member that the Judiciary has concluded that it lacks jurisdiction under § 372(c).

Commentary on Rule 4

Expeditious Review

The statute requires the chief judge to review a complaint "expeditiously." Although it does not seem necessary to repeat this language in a rule, we take note of the fact that chief judges differ substantially in the speed with which they act on complaints. In our view, it should be a rare case in which more than sixty days is permitted to elapse from the filing of the complaint to the chief judge's action on it.

Purpose of Chief Judge's Review

Although the statute permits the chief judge to conclude the proceeding "if he finds that" appropriate corrective action has been taken, it seems clear that the chief judge, in cases in which a complaint appears to have merit, should make every effort to determine whether it is possible to fashion a remedy without the necessity of appointing a special committee. The formal investigatory procedures are to be regarded as a last resort; the remedial purposes of the statute are on the whole better and more promptly served if an informal solution can be found that will correct the problem giving rise to a complaint.

Inquiry by Chief Judge

It seems clear under the statute that the chief judge is not required to act solely on the face of the complaint. The power to conclude a complaint proceeding on the basis that corrective action has been taken implies some power to determine whether the facts alleged are true. *See Report of the National Commission on Judicial Discipline and Removal* (1993), at 102 [hereinafter *National Commission Report*] ("such power is necessarily contemplated by the Act's provision authorizing a chief judge to conclude a proceeding"). But the boundary line of that power - the point at which a chief judge invades the territory reserved for special committees - is unclear. Rule 4(b) addresses that issue by stating that the chief judge may conduct a limited inquiry to determine whether the facts of the complaint are "either plainly untrue or are incapable of being established through investigation," and that the chief judge "will not undertake to make findings of fact about any matter that is reasonably in dispute." *See*

id. (rule 4(b) "represents a sensible accommodation of the policies and interests that are implicated"). Admittedly, this formulation may do little more than state the obvious, leaving the most difficult questions unanswered. Offered here, as commentary, are some suggestions to our fellow chief judges about the implementation of this principle. A number of examples, all but the first based on actual cases, illustrate the problem:

(1) The complainant alleges an impropriety and asserts that he knows of it because his voices told him. It would appear clearly appropriate to treat such a complaint as frivolous.

(2) The complainant alleges an impropriety and asserts that he knows of it because it was observed and reported to him by a person whom the complainant is not free to identify. The judge denies that the event occurred. In some instances similar to this, chief judges have dismissed the complaint, reasoning that there is nothing to fuel an investigation. The statutory basis for the dismissal does not seem strong, but the result seems eminently sensible unless one thinks (and we do not) that it is appropriate for a special committee to subpoena the complainant and insist on the identity of the source. On balance, it would appear that the complaint should be dismissed as frivolous in such a case.

(3) The complainant alleges an impropriety and asserts that he knows of it because it was observed and reported to him by a person who is identified. The judge denies that the event occurred. When contacted, the source also denies it. In such a case, the chief judge's proper course of action may well turn on whether the source had any role in the allegedly improper conduct. If the complaint were based on a lawyer's statement that he had had an improper ex parte contact with a judge, the lawyer's denial of the impropriety might not be taken as wholly persuasive, and it seems appropriate to conclude that a real factual issue is raised. On the other hand, if the complaint quoted a disinterested third party and the disinterested party denied that the statement had been made, there would not appear to be any value in opening a formal investigation. In such a case, it would seem appropriate to dismiss the complaint as frivolous on the basis that there is no support for the allegation of misconduct.

(4) The complainant alleges an impropriety and alleges that he observed it and there were no other witnesses; the judge denies that the event occurred. This situation presents the possibility of a simple credibility conflict. Unless the complainant's allegations are wholly implausible, it would appear that a special committee must be appointed because there is a factual question that is reasonably in dispute.

Grounds for Dismissal of Complaints

It is accepted practice in many circuits to dismiss as "frivolous" under 28 U.S.C. § 372(c)(3)(A)(iii) a complaint that is shown to be unfounded by the chief judge's limited inquiry pursuant to rule 4(b). The term "frivolous," however, may be more commonly understood by complainants to refer to complaints that contain insufficient factual allegations to warrant inquiry, as opposed to complaints adequate on their face that are found clearly unsupported after a limited inquiry. A statement that a dismissal is for frivolousness, therefore, "could readily be misunderstood as an indication that the chief judge did not take the complaint's allegations seriously. This kind of misperception might prove particularly unfortunate where a complaint raises sensitive . . . allegations (for example, of ethnic or gender bias) that are found unsupported after inquiry." *National Commission Report* at 98. To avoid such misunderstanding, the chief judge may indicate in the order of dismissal that the complaint, while not inadequate on its face, has been shown by a limited inquiry pursuant to rule 4(b) to be plainly untrue or incapable of being established through investigation.

Rule 4(c)(4) provides that a complaint may be dismissed as "otherwise not appropriate for consideration." This language is intended to accommodate dismissals of complaints for reasons such as untimeliness (see rule 1(d)) or mootness.

Opportunity of Judge to Respond

Rule 4(e) states that a judge will ordinarily be invited to respond to the complaint before a special

committee is appointed.

Judges, of course, receive copies of complaints at the same time that they are referred to the chief judge, and they are free to volunteer responses to them. Under rule 4(b), the chief judge may request a response if it is thought necessary. However, many complaints are clear candidates for dismissal even if their allegations are accepted as true, and there is no need for the judge complained about to devote time to a defense. By stating that a special committee will not ordinarily be appointed unless an invitation to respond has been issued by the chief judge, the rule should encourage officials not to respond unnecessarily.

Notification to Complainant and Judge

Section 372(c)(3) requires that the order dismissing a complaint or concluding the proceeding contain a statement of reasons and that a copy of the order be sent to the complainant. It appears that in most circuits it is the practice to prepare a formal order disposing of the complaint and a separate memorandum of reasons. In such a case, both the order and the memorandum are provided to the complainant. Rule 4(f) would accept that practice. Rule 17, dealing with availability of information to the public, contemplates that the memorandum would be made public, usually without disclosing the names of the complainant or the judge involved. If desired for administrative purposes, more identifying information can be included on the formal order.

When complaints are disposed of by chief judges, we believe that the statutory purposes are best served by providing the complainant with a relatively expansive explanation. *See National Commission Report* at 108 ("a non-conclusory statement may be critical to a complainant's ability to understand the action taken as well as to the understanding of those engaged in oversight or evaluation"). See also the discussion of rule 17, dealing with public availability.

Rule 4(f) also provides that the complainant will be notified, in the case of a disposition by the chief judge, of the right to petition the judicial council for review. That appears not to be a common practice today. Although the complainant should in all cases have a copy of the circuit rules at the time the complaint is filed, it seems appropriate to provide a reminder at the time of dismissal of the complaint.

Allegations of Criminal Conduct

In the course of implementing § 372(c), some circuits have ruled that certain instances of alleged criminal conduct did not fall within the definition of misconduct set out in 28 U.S.C. § 372(c)(1), i.e., "conduct prejudicial to the effective and expeditious administration of the business of the courts." Generally speaking, the rationale of these rulings is that there is some range of purely personal behavior of a judge - in some conceivable circumstances even criminal behavior - that has so little relationship to the performance of judicial duties as to be not cognizable under § 372(c). These rulings raise the concern that dismissal by a circuit, solely on jurisdictional grounds, of non- frivolous allegations of criminal conduct - without at least informing the complainant that he or she may bring those allegations to the attention of criminal authorities - entails a risk that no one will undertake whatever investigation of those allegations may be appropriate. Actual criminal conduct might then go unpunished. Rule 4(i) would resolve this problem by requiring a chief judge in that situation to inform the complainant that the dismissal does not prevent the complainant from bringing any allegation of criminal conduct to the attention of appropriate federal or state criminal authorities. If the allegations were originally referred to the circuit by a Congressional committee or member of Congress, the chief judge shall also notify the Congressional committee or member that the Judiciary has concluded that it lacks jurisdiction under § 372(c). Rule 14(k) imposes similar requirements for a judicial council's dismissal, solely on jurisdictional grounds, of a complaint alleging criminal conduct.

EXHIBIT B-1: ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY

Chapter 3: Review of Chief Judge's Disposition of a Complaint

RULE 5. PETITION FOR REVIEW OF CHIEF JUDGE'S DISPOSITION

If the chief judge dismisses a complaint or concludes the proceeding on the ground that corrective action has been taken or that intervening events have made action unnecessary, a petition for review may be addressed to the judicial council of the circuit. The judicial council may affirm the order of the chief judge, return the matter to the chief judge for further action, or, in exceptional cases, take other appropriate action.

Commentary on Rule 5

Petition to the Judicial Council for Review

Section 372(c)(10) provides that a complainant or judge aggrieved by a chief judge's order dismissing a complaint or concluding a proceeding on the basis of corrective action or intervening events may "petition the judicial council for review thereof."

There is some suggestion in the legislative history that the draftsmen contemplated a two-step procedure, under which the council would first determine whether to grant or deny review and would then, if the petition were granted, proceed to the merits. Senator DeConcini, explaining the bill just before final Senate passage, said that "the judicial council may exercise its discretion in granting . review."[6] Moreover, the "petition . . . for review" formulation was used in the very next sentence of the legislation to describe the procedure for obtaining Judicial Conference review of an order of a judicial council, and in that context congressional leaders indicated that they contemplated a procedure analogous to the certiorari procedure in the Supreme Court.[7]

The analogy to the writ of certiorari raises more questions than it answers, however. The essence of the certiorari procedure is that the standards used for deciding whether to hear a case are different from the standards used for deciding a case on the merits. In the context of the petition for review to the judicial council from a chief judge's disposition of a complaint, it is not at all clear what different standards might apply to decisions whether or not to grant review. Indeed, Senator DeConcini, immediately after stating that the judicial council would have discretion, said, "It is to be expected that it is only in those rare cases where the chief judge has not recognized the merit of a complaint, that the council will reexamine a dismissed complaint about the conduct of a judge."[8] That statement seems to imply that the decision whether to grant review is to be a decision on the merits.

In our view, therefore, the council should ordinarily review the decision of the chief judge on the merits, treating the petition for review for all practical purposes as an appeal. This view has been carried into the rules, which state that the circuit council may respond to a petition by affirming the chief judge's order, remanding the matter, or, in exceptional cases, taking other appropriate action. The "exceptional cases" language would permit the council to deny review rather than affirm in a case in which the process was obviously being abused.

[6] 126 Cong. Rec. 28,086 (1980).

[7] *Id.* at 28,092-93 (remarks of Sen. DeConcini); *id.* at 28,616 (remarks of Rep. Kastenmeier).

[8] *Id.* at 28,086.

Last Modified - Thursday Jan 02, 2003

The Guide - Volume 3 Back to Graphical Site

EXHIBIT B-1: ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY

Chapter 3: Review of Chief Judge's Disposition of a Complaint

RULE 6. HOW TO PETITION FOR REVIEW OF A DISPOSITION BY THE CHIEF JUDGE

(a) Time. A petition for review must be received in the office of the clerk of the court of appeals within 30 days of the date of the clerk's letter to the complainant transmitting the chief judge's order.

(b) Form. A petition should be in the form of a letter, addressed to the clerk of the court of appeals, beginning "I hereby petition the judicial council for review of the chief judge's order . . . ." There is no need to enclose a copy of the original complaint.

(c) Legibility. Petitions should be typewritten if possible. If not typewritten, they must be legible.

(d) Number of copies. Only an original is required.

(e) Statement of grounds for petition. The letter should set forth a *brief* statement of the reasons why the petitioner believes that the chief judge should not have dismissed the complaint or concluded the proceeding. It should not repeat the complaint; the complaint will be available to members of the circuit council considering the petition.

(f) Signature. The letter must be signed.

(g) Where to file. Petition letters should be sent to:

Clerk, United States Court of Appeals [address].

The envelope should be marked "Misconduct Petition" or "Disability Petition." The name of the judge complained about should *not* appear on the envelope.

(h) No fee required. There is no fee for filing a petition under this procedure.

Commentary on Rule 6

Time for Filing Petition for Review

The three national courts and half the circuits have no time limit on the filing of a petition for review. The other half of the circuits have time limits of twenty or thirty days. Rule 6(a) contains a limit of thirty days.

It seems appropriate that there should be some time limit on petitions for review of chief judges' dispositions in order to provide finality to the process. If the complaint requires an investigation, the investigation should proceed; if it does not, the judge complained about should know at some point that the matter is closed. On the other hand, the time limit should be relatively generous in recognition of the fact that most complainants are unrepresented and many are not well organized to maintain the discipline of court deadlines. The thirty-day limit is included with these considerations in mind.

In accordance with this generous approach, rule 7(c) of the rules provides for an automatic extension of the time if a person files a petition that is rejected for failure to comply with formal requirements.

Last Modified - Thursday Jan 02, 2003

EXHIBIT B-1: ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY

Chapter 3: Review of Chief Judge's Disposition of a Complaint

RULE 7. ACTION BY CLERK OF COURT OF APPEALS UPON RECEIPT OF A PETITION FOR REVIEW

(a) Receipt of timely petition in proper form. Upon receipt of a petition for review filed within the time allowed and in proper form under these rules, the clerk of the court of appeals will acknowledge receipt of the petition. The clerk will promptly send to each member of the judicial council, except for any member disqualified under rule 18, copies of (1) the complaint form and statement of facts, (2) any response filed by the judge, (3) any record of information received by the chief judge in connection with the chief judge's consideration of the complaint, (4) the chief judge's order disposing of the complaint, (5) any memorandum in support of the chief judge's order, (6) the petition for review, (7) any other documents in the files of the clerk that appear to be relevant and material to the petition, (8) a list of any documents in the clerk's files that are not being sent because they are not considered relevant and material, and (9) a ballot that conforms with rule 8(a). The clerk will also send the same materials, except for the ballot, to the chief judge of the circuit, the circuit executive, and each judge whose conduct is at issue, except that materials previously sent to a person may be omitted.

(b) Receipt of untimely petition. The clerk will refuse to accept a petition that is received after the deadline set forth in rule 6(a).

(c) Receipt of timely petition not in proper form. Upon receipt of a petition filed within the time allowed but not in proper form under these rules (including a document that is ambiguous about whether a petition for review is intended), the clerk will acknowledge receipt of the petition, call the petitioner's attention to the deficiencies, and give the petitioner the opportunity to correct the deficiencies within fifteen days of the date of the clerk's letter or within the original deadline for filing the petition, whichever is later. If the deficiencies are corrected within the time allowed, the clerk will proceed in accordance with paragraph (a) of this rule. If the deficiencies are not corrected, the clerk will reject the petition.

Commentary on Rule 7

Transmittal of Documents by Clerk

The rules include no limit on the volume of documents that may be submitted in support of a complaint. One of the problems created by this liberality is that some complaint files may get very thick with attachments. Hence, it was thought appropriate that the clerk have some discretion to decide what portions of the file should be duplicated and transmitted to the members of the circuit council. Rule 7(a) provides such discretion but requires the clerk to furnish a list of the documents not transmitted. Rule 8(b) enables each member of the council, as well as the judge complained about, to obtain a copy of any document not originally transmitted by the clerk.

Last Modified - Thursday Jan 02, 2003

EXHIBIT B-1: ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY

Chapter 3: Review of Chief Judge's Disposition of a Complaint

RULE 8. REVIEW BY THE JUDICIAL COUNCIL OF A CHIEF JUDGE'S ORDER

(a) Mail ballot. Each member of the judicial council to whom a ballot was sent will return a signed ballot, or otherwise communicate the member's vote, to the [clerk of the court of appeals] [circuit executive]. The ballot form will provide opportunities to vote to (1) affirm the chief judge's disposition, or (2) place the petition on the agenda of a meeting of the judicial council. The form will also provide an opportunity for members to indicate that they have disqualified themselves from participating in consideration of the petition.

Votes will be tabulated when all members of the judicial council to whom ballots were sent have either voted or indicated that they are disqualified. After 20 days from the date the petition and related materials were sent to members of the judicial council, votes may be tabulated if they have been cast by at least two-thirds of the members to whom ballots were sent. Members who have disqualified themselves will be treated for this purpose as if ballots had not been sent to them.

If all of the votes cast should be for affirmance, the chief judge's order will be affirmed. If any of the members votes to place the petition on the agenda of a council meeting, that will be done.

(b) Availability of documents. Upon request, the clerk will make available to any member of the judicial council or to the judge complained about any document from the files that was not sent to the council members pursuant to rule 7(a).

(c) Vote at meeting of judicial council. If a petition is placed on the agenda of a meeting of the judicial council, council action may be taken by a majority of the members present and voting.

(d) Rights of judge complained about.

(1) At any time after the filing of a petition for review by a complainant, the judge complained about may file a written response with the clerk of the court of appeals. The clerk will promptly distribute copies of the response to each member of the judicial council who is not disqualified, to the chief judge, and to the complainant. The judge may not communicate with individual council members about the matter, either orally or in writing.

(2) The judge complained about will be provided with copies of any communications that may be addressed to the members of the judicial council by the complainant.

(e) Notice of council decision.

(1) The order of the judicial council, together with any accompanying memorandum in support of the order, will be provided to the complainant, the judge, and any judge entitled to receive a copy of the complaint pursuant to rule 3(a)(2).

(2) If the decision is unfavorable to the complainant, the complainant will be notified that the law provides for no further review of the decision.

(3) A memorandum supporting a council order will not include the name of the complainant or the judge whose conduct was complained of. If the order of the council affirms the chief judge's disposition, a supporting memorandum will be prepared only if the judicial council concludes that there is a need to supplement the chief judge's explanation.

(f) Public availability of council decision. Materials related to the council's decision will be made public at the time and in the manner set forth in rule 17.

Commentary on Rule 8

Voting Procedures

The use of mail ballots on petitions for review appears to be common practice. Rule 8(a) adopts the procedure but modifies it to assure that there will be full discussion in the council if any member believes that summary affirmance may not be appropriate. Any member of the council may cause the question to be placed on the agenda of a council meeting.

It should be emphasized that the "rule of one" on the mail ballot is not intended to invoke the analogy of the Supreme Court's certiorari jurisdiction. A vote to affirm on the mail ballot is intended to be a vote on the merits. The "rule of one" is intended to guarantee an opportunity for discussion and a vote following discussion if any member of the council is uncomfortable with a summary affirmance.

Last Modified - Thursday Jan 02, 2003

EXHIBIT B-1: ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY

Chapter 4: Investigation and Recommendation by Special Committee

RULE 9. APPOINTMENT OF SPECIAL COMMITTEE

(a) Membership. A special committee appointed pursuant to rule 4(e) will consist of the chief judge of the circuit and equal numbers of circuit and district judges. If the complaint is about a district judge, bankruptcy judge, or magistrate judge, the district judge members of the committee will be from districts other than the district of the judge complained about.

(b) Presiding officer. At the time of appointing the committee, the chief judge will designate one of its members (who may be the chief judge) as the presiding officer. When designating another member of the committee as the presiding officer, the chief judge may also delegate to such member the authority to direct the clerk of the court of appeals to issue subpoenas related to proceedings of the committee.

(c) Bankruptcy judge or magistrate judge as adviser. If the judicial officer complained about is a bankruptcy judge or magistrate judge, the chief judge may designate a bankruptcy judge or magistrate judge, as the case may be, to serve as an adviser to the committee. The chief judge will designate such an adviser if, within ten days of notification of the appointment of the committee, the bankruptcy judge or magistrate judge complained about requests that an adviser be designated. The adviser will be from a district other than the district of the bankruptcy judge or magistrate judge complained about. The adviser will not vote but will have the other privileges of a member of the committee.

(d) Provision of documents. The chief judge will certify to each other member of the committee and to the adviser, if any, copies of (1) the complaint form and statement of facts, and (2) any other documents on file pertaining to the complaint (or to that portion of the complaint referred to the special committee).

(e) Continuing qualification of committee members. A member of a special committee who was qualified at the time of appointment may continue to serve on the committee even though the member relinquishes the position of chief judge, active circuit judge, or active district judge, as the case may be, but only if the member continues to hold office under article III, section 1, of the Constitution of the United States.

(f) Inability of committee member to complete service. In the event that a member of a special committee can no longer serve because of death, disability, disqualification, resignation, retirement from office, or other reason, the chief judge of the circuit will determine whether to appoint a replacement member, either a circuit or district judge as the case may be. However, no special committee appointed under these rules will function with only a single member, and the quorum and voting requirements for a two-member committee will be applied as if the committee had three members.

Commentary on Rule 9

Membership and Presiding Officer

Rule 9 leaves the size of a special committee flexible, to be determined on a case-by-case basis.

In our view, there is good reason to preserve the statutory flexibility in this regard. The question of committee size is one that should be weighed with some care in view of the potential for consuming the members' time; a large committee should be appointed only if there is a special reason to do so.

Although the statute requires that the chief judge be a member of each special committee, it does not require that the chief judge preside.[9] Once again, the rules leave the decision for case-by- case

determination at the time the committee is appointed.

Section 372(c)(9)(A) provides that a special committee will have subpoena powers as provided in 28 U.S.C. § 332(d). The latter section provides that subpoenas shall be issued on behalf of circuit councils by the clerk of the court of appeals "at the direction of the chief judge of the circuit or his designee." While it might be regarded as implicit that a special committee can exercise its subpoena power through its own presiding officer, strict compliance with the letter of section 332(d) would appear to be the safer course. Rule 9(b) therefore invites the chief judge, when designating someone else as presiding officer, to make an explicit delegation of the authority to direct the issuance of subpoenas related to committee proceedings.

It may be noted that we have not specifically addressed the case in which, because of disqualification of the chief judge, another judge is exercising the powers of the chief judge in the section 372(c) proceeding. Caution might suggest that the designation to direct the issuance of subpoenas should nevertheless come from the chief judge.

Bankruptcy Judge or Magistrate Judge as Adviser

The rules of three circuits provide that, if a bankruptcy judge or magistrate judge is the judicial officer complained about, a bankruptcy judge or magistrate judge, respectively, will be named as an adviser to the special committee. Rule 9(c) adopts that provision with a modification: Instead of mandating the appointment of such an adviser, it provides that the chief judge may appoint an adviser sua sponte and will do so upon request of the judge complained about.

The rule provides that the adviser will have all the privileges of a member of a committee except the franchise. That would include participating in all deliberations of the committee, questioning witnesses at hearings, and even writing a separate statement to accompany the report of the special committee to the judicial council.

Continuing Qualification

Rule 9(e) provides that a member of a special committee who remains an article III judge may continue to serve on the committee even though the member's status changes. Thus, a committee that originally consisted of the chief judge and an equal number of circuit and district judges, as required by the law, may continue to function even though changes of status alter that composition. This provision reflects the belief that stability of membership will make an important contribution to the quality of the work of such committees.

Inability of Committee Member to Complete Service

Stability of membership is also the principal concern animating rule 9(f), which deals with the case in which a special committee loses a member before its work is complete. The rule would permit the chief judge to determine whether a replacement member should be appointed. It is our view generally that appointment of a replacement member is desirable in these situations unless the committee has conducted evidentiary hearings before the vacancy occurs. However, other cases may also arise in which a committee is in the late stages of its work, and in which it would be difficult for a new member to play a meaningful role. The rule protects the collegial character of the committee process by prohibiting a single surviving member from serving as a committee and by providing that a committee of two surviving members will, in essence, operate under a unanimity rule.

[9] *See* H.R. Rep. No. 1313, 96th Cong., 2d Sess. 11 (1980) (chief judge may appoint another judge as presiding officer).

Last Modified - Thursday Jan 02, 2003

The Guide - Volume 3 Back to Graphical Site

EXHIBIT B-1: ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY

Chapter 4: Investigation and Recommendation by Special Committee

RULE 10. CONDUCT OF AN INVESTIGATION

(a) Extent and methods to be determined by committee. Each special committee will determine the extent of the investigation and the methods of conducting it that are appropriate in the light of the allegations of the complaint. If, in the course of the investigation, the committee develops reason to believe that the judge may have engaged in misconduct that is beyond the scope of the complaint, the committee may, with written notice to the judge, expand the scope of the investigation to encompass such misconduct.

(b) Criminal matters. In the event that the complaint alleges criminal conduct on the part of a judge, or in the event that the committee becomes aware of possible criminal conduct, the committee will consult with the appropriate prosecuting authorities to the extent permitted by 28 U.S.C. § 372(c)(14) in an effort to avoid compromising any criminal investigation. However, the committee will make its own determination about the time of its activities, having in mind the importance of ensuring the proper administration of the business of the courts.

(c) Staff. The committee may arrange for staff assistance in the conduct of the investigation. It may use existing staff of the judicial branch or may arrange, through the Administrative Office of the United States Courts, for the hiring of special staff to assist in the investigation.

(d) Delegation. The committee may delegate duties in its discretion to subcommittees, to staff members, to individual committee members, or to an adviser designated under rule 9(c). The authority to exercise the committee's subpoena powers may be delegated only to the presiding officer. In the case of failure to comply with such subpoena, the judicial council or special committee may institute a contempt proceeding consistent with 28 U.S.C. § 332(d).

(e) Report. The committee will file with the judicial council a comprehensive report of its investigation, including findings of the investigation and the committee's recommendations for council action. Any findings adverse to the judge will be based on evidence in the record. The report will be accompanied by a statement of the vote by which it was adopted, any separate or dissenting statements of committee members, and the record of any hearings held pursuant to rule 11.

(f) Voting. All actions of the committee will be by vote of a majority of all of the members of the committee.

Commentary on Rule 10

Nature of the Process

Rule 10 and the three rules that follow are all concerned with the way in which a special committee carries out its mission. They reflect the view that a special committee has what are generally regarded in our jurisprudence as two distinct roles. The committee will often be performing an investigative role of the kind that is characteristically given to executive branch agencies in our system of justice and, in some stages, a more formalized fact-finding role. Even though the same body has responsibility for both roles under section 372(c), it is important to distinguish between them in order to ensure that due process rights are afforded at appropriate times to the judge complained about.

Criminal Matters

One of the difficult questions that can arise under the judicial discipline statute is the relationship between proceedings under this statute and criminal investigations. Rule 10(b) assigns coordinating

responsibility to the special committee in cases in which criminal conduct is suspected and gives the committee the authority to decide what the appropriate pace of its activity should be in light of any criminal investigation. We do not mean to suggest, however, that a special committee should abdicate its responsibility by assenting to indefinite deferral of its own work.

It is noted that a special committee may be barred from disclosing some information to a prosecutor or grand jury under 28 U.S.C. § 372(c)(14). This provision is discussed in the commentary under rule 16.

Delegation

Rule 10(d) permits the committee, in its discretion, to delegate any of its duties to subcommittees, individual committee members, or staff. This is consistent with the general principle, expressed in rule 10(a), that each special committee will determine the methods of conducting the investigation that are appropriate in the light of the allegations of the complaint. It is, of course, not contemplated that the ultimate duty of adopting a report would be delegable.

Judge Seitz regards it as inappropriate to delegate the function of conducting hearings, and believes that the rule should explicitly prohibit such delegation.

Rule 9(b) suggests that, where the chief judge designates someone else as presiding officer of a special committee, the presiding officer also be delegated the authority to direct the clerk of the court of appeals to issue subpoenas related to committee proceedings. That is not intended to imply, however, that the decision to direct the issuance of a subpoena is necessarily exercisable by the presiding officer alone. Under rule 10(d), it is up to the committee to decide whether to delegate that decision-making authority.

Basis of Findings

Rule 10(e) requires that findings adverse to the judge complained about be based on evidence in the record. There is no similar requirement in the rules for determinations favorable to the judge. We contemplate that a committee may, in some circumstances, recommend dismissal of a complaint on the ground that preliminary investigation reveals no basis for going forward with hearings on the record.

Voting in the Special Committee

Rule 10(f) provides that actions of a special committee will be by vote of a majority of all the members. It seems reasonable to expect that, almost always, all the members of a committee will participate in committee decisions. In that circumstance, it seems reasonable to require that committee decisions be made by a majority of the membership, rather than a majority of some smaller quorum.

Last Modified - Thursday Jan 02, 2003

Back to Graphical Site

The Guide - Volume 3

EXHIBIT B-1: ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY

Chapter 4: Investigation and Recommendation by Special Committee

RULE 11. CONDUCT OF HEARINGS BY SPECIAL COMMITTEE

(a) Purpose of hearings. The committee may hold hearings to take testimony and receive other evidence, to hear argument, or both. If the committee is investigating allegations against more than one judge, it may, in its discretion, hold joint hearings or separate hearings.

(b) Notice to judge complained about. The judge complained about will be given adequate notice in writing of any hearing held, its purposes, the names of any witnesses whom the committee intends to call, and the text of any statements that have been taken from such witnesses. The judge may at any time suggest additional witnesses to the committee.

(c) Committee witnesses. All persons who are believed to have substantial information to offer will be called as committee witnesses. Such witnesses may include the complainant and the judge complained about. The witnesses will be questioned by committee members, staff, or both. The judge will be afforded the opportunity to cross-examine committee witnesses, personally or through counsel.

(d) Witnesses called by the judge. The judge complained about may also call witnesses and may examine them personally or through counsel. Such witnesses may also be examined by committee members, staff, or both.

(e) Witness fees. Witness fees will be paid as provided in 28 U.S.C. § 1821.

(f) Rules of evidence; oath. The Federal Rules of Evidence will apply to any evidentiary hearing except to the extent that departures from the adversarial format of a trial make them inappropriate. All testimony taken at such a hearing will be given under oath or affirmation.

(g) Record and transcript. A record and transcript will be made of any hearing held.

Commentary on Rule 11

The Role of Hearings in the Investigation Process

It has already been observed that the roles of a special committee include an investigative role and a fact-finding role. In conformity with this concept of roles, we would expect hearings to be held only after the investigative work has been done and the committee has concluded that there is sufficient evidence to warrant a formal fact-finding proceeding. Rule 11 is concerned only with the conduct of hearings, and does not govern the earlier, investigative stages of a special committee's work.

Inevitably, a hearing will have something of an adversary character. The judge who has been complained about will surely feel threatened if the matter has reached this stage. We believe, nevertheless, that these tendencies should be moderated to the extent possible. Even though we have suggested that there are two roles and that an investigation will commonly have two distinct stages, we do not mean to imply that committee members should regard themselves as prosecutors one day and judges the next. Their duty _ and that of their staff _ is at all times to be impartial.

In conformity with this view, rule 11(c) contemplates that witnesses at hearings should generally be called as committee witnesses, regardless of whether their testimony will be favorable or unfavorable to the judge complained about. Staff or others who are organizing the hearings should regard it as their role to present the entire picture, and not to act as prosecutors. Even the judge complained about should normally be called as a committee witness. Although rule 11(d) preserves the statutory right of

the judge to call witnesses on his or her own behalf, we believe that this should not often be necessary.

Testimony of Judge

As noted above, we believe that it is appropriate to call the complainee judge as a committee witness. We assume that the judge would wish to testify in most cases, and we believe that the special committee should be the sponsor of that testimony as well as other testimony favorable to the judge. We recognize, however, that cases may arise in which the judge will not testify voluntarily. In such cases, subpoena power appears to be available, subject to the normal testimonial privileges.

Applicability of Rules of Evidence

Rule 11(f) provides that the Federal Rules of Evidence will apply to evidentiary hearings conducted by special committees "except to the extent that departures from the adversarial format of a trial make them inappropriate."

Last Modified - Thursday Jan 02, 2003

EXHIBIT B-1: ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY

Chapter 4: Investigation and Recommendation by Special Committee

RULE 12. RIGHTS OF JUDGE IN INVESTIGATION

(a) Notice. The judge complained about is entitled to written notice of the investigation (rule 4(f)), to written notice of expansion of the scope of an investigation (rule 10(a)), and to written notice of any hearing (rule 11(b)).

(b) Presentation of evidence. The judge is entitled to a hearing, and has the right to present evidence and to compel the attendance of witnesses and the production of documents at the hearing. Upon request of the judge, the chief judge or his designee will direct the clerk of the court of appeals to issue a subpoena in accordance with 28 U.S.C. § 332(d)(1).

(c) Presentation of argument. The judge may submit written argument to the special committee at any time, and will be given a reasonable opportunity to present oral argument at an appropriate stage of the investigation.

(d) Attendance at hearings. The judge will have the right to attend any hearing held by the special committee and to receive copies of the transcript and any documents introduced, as well as to receive copies of any written arguments submitted by the complainant to the committee.

(e) Receipt of committee's report. The judge will have the right to receive the report of the special committee at the time it is filed with the judicial council.

(f) Representation by counsel. The judge may be represented by counsel in the exercise of any of the rights enumerated in this rule. The costs of such representation may be borne by the United States as provided in rule 14(h).

Commentary on Rule 12

Right to Attend Hearings

The statute states that rules adopted by judicial councils shall contain provisions requiring that "the judge or magistrate whose conduct is the subject of the complaint be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing." To implement this provision, rule 12(d) gives the judge the right to attend any hearing held by the committee. The word "hearings" is used in the rules to include sessions held for the purpose of receiving evidence of record or hearing argument.

We do not read the statute as requiring that the judge be permitted to attend *all* proceedings of the special committee. Hence, the rules do not accord a right to attend such proceedings as meetings at which the committee is engaged in investigative activity (such as interviewing a possible witness or examining documents delivered pursuant to a subpoena duces tecum to determine if they contain relevant evidence) or meetings at which the committee is deliberating on the evidence.

Last Modified - Thursday Jan 02, 2003

The Guide - Volume 3 Back to Graphical Site

EXHIBIT B-1: ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY

Chapter 4: Investigation and Recommendation by Special Committee

RULE 13. RIGHTS OF COMPLAINANT IN INVESTIGATION

(a) Notice. The complainant is entitled to written notice of the investigation as provided in rule 4(f). Upon the filing of the special committee's report to the judicial council, the complainant will be notified that the report has been filed and is before the council for decision. Although the complainant is not entitled to a copy of the report of the special committee, the judicial council may, in its discretion, release a copy of the report of the special committee to the complainant.

(b) Opportunity to provide evidence. The complainant is entitled to be interviewed by a representative of the committee. If it is believed that the complainant has substantial information to offer, the complainant will be called as a witness at a hearing.

(c) Presentation of argument. The complainant may submit written argument to the special committee at any time. In the discretion of the special committee, the complainant may be permitted to offer oral argument.

(d) Representation by counsel. A complainant may submit written argument through counsel and, if permitted to offer oral argument, may do so through counsel.

Commentary on Rule 13

In accordance with the view of the process as fundamentally administrative, these rules do not give the complainant the rights of a party to litigation, and leave the complainant's role largely within the discretion of the special committee. However, rule 13(b) promises complainants that, where a special committee has been appointed, the complainant will at a minimum be interviewed by a representative of the committee. Such an interview may, of course, be in person or by telephone, and the representative of the committee may be either a member or staff. In almost every case, such an interview would be regarded by the committee as essential in the performance of its task. We believe, nevertheless, that it is helpful to provide the assurance in the rules that complainants will have an opportunity to tell their stories orally.

Rule 13 does not contemplate that the complainant will ordinarily be permitted to attend proceedings of the special committee except when testifying or presenting oral argument. The special committee may exercise its discretion to permit the complainant to be present at its proceedings, or to permit the complainant, individually or through counsel, to participate in the examination or cross- examination of witnesses.

Section 372(c)(14)(A), as amended by section 402(c)(2)(E) of the Judicial Discipline and Removal Reform Act of 1990, authorizes an exception to the confidentiality provisions of section 372(c)(14) where the judicial council has in its discretion released a copy of the report of the special committee to the complainant and to the judge who is the subject of the complaint. Since these rules view the disciplinary process as fundamentally administrative rather than adversarial, the rules do not accord the complainant the rights of a litigant and do not entitle the complainant to receipt of a copy of the report of the special committee. Therefore, it remains a matter within the discretion of the judicial council whether to release a copy of the special committee's report to the complainant.

In exercising their discretion regarding the role of the complainant in the section 372(c) process, the special committee and the judicial council of course should protect the integrity of that process. As a consequence, a complainant who has violated the confidentiality provisions of section 372(c)(14) ordinarily will be accorded no role in further proceedings beyond the minimum that these rules require.

Last Modified - Thursday Jan 02, 2003

EXHIBIT B-1: ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY

Chapter 5: Judicial Council Consideration of Recommendations of Special Committee

RULE 14. ACTION BY JUDICIAL COUNCIL

(a) Purpose of judicial council consideration. After receipt of a report of a special committee, the judicial council will determine whether to dismiss the complaint, conclude the proceeding on the ground that corrective action has been taken or that intervening events make action unnecessary, refer the complaint to the Judicial Conference of the United States, or order corrective action.

(b) Basis of council action. Subject to the rights of the judge to submit argument to the council as provided in rule 15(a), the council may take action on the basis of the report of the special committee and the record of any hearings held. If the council finds that the report and record provide an inadequate basis for decision, it may (1) order further investigation and a further report by the special committee or (2) conduct such additional investigation as it deems appropriate.

(c) Dismissal. The council will dismiss a complaint if it concludes:

(1) that the claimed conduct, even if the claim is true, is not "conduct prejudicial to the effective and expeditious administration of the business of the courts" and does not indicate a mental or physical disability resulting in inability to discharge the duties of office;

(2) that the complaint is directly related to the merits of a decision or procedural ruling;

(3) that the facts on which the complaint is based have not been demonstrated; or

(4) that, under the statute, the complaint is otherwise not appropriate for consideration.

(d) Conclusion of the proceeding on the basis of corrective action taken. The council will conclude the complaint proceeding if it determines that appropriate action has already been taken to remedy the problem identified in the complaint, or that intervening events make such action unnecessary.

(e) Referral to Judicial Conference of the United States. The judicial council may, in its discretion, refer a complaint to the Judicial Conference of the United States with the council's recommendations for action. It is required to refer such a complaint to the Judicial Conference of the United States if the council determines that a circuit judge or district judge may have engaged in conduct:

(1) that might constitute ground for impeachment; or

(2) that, in the interest of justice, is not amenable to resolution by the judicial council.

(f) Order of corrective action. If the complaint is not disposed of under paragraphs (c) through (e) of this rule, the judicial council will take other action to assure the effective and expeditious administration of the business of the courts. Such action may include, among other measures:

(1) censuring or reprimanding the judge, either by private communication or by public announcement;

(2) ordering that, for a fixed temporary period, no new cases be assigned to the judge;

(3) in the case of a magistrate judge, ordering the chief judge of the district court to take action specified by the council, including the initiation of removal proceedings pursuant to 28 U.S.C. § 631(i);

(4) in the case of a bankruptcy judge, removing the judge from office pursuant to 28 U.S.C. § 152;

(5) in the case of a circuit or district judge, requesting the judge to retire voluntarily with the provision (if necessary) that ordinary length-of-service requirements will be waived; and

(6) in the case of a circuit or district judge who is eligible to retire but does not do so, certifying the disability of the judge under 28 U.S.C. § 372(b) so that an additional judge may be appointed.

(g) Combination of actions. Referral of a complaint to the Judicial Conference of the United States under paragraph (e) or to a district court under paragraph (f)(3) of this rule will not preclude the council from simultaneously taking such other action under paragraph (f) as is within its power.

(h) Recommendation about fees. Upon the request of a judge whose conduct is the subject of a complaint, the judicial council may, if the complaint has been finally dismissed, recommend that the Director of the Administrative Office of the United States Courts award reimbursement, from funds appropriated to the Judiciary, for those reasonable expenses, including attorneys' fees, incurred by that judge during the investigation, which would not have been incurred but for the requirements of 28 U.S.C. § 372(c) and these rules.

(i) Notice of action of judicial council. Council action will be by written order. Unless the council finds that, for extraordinary reasons, it would be contrary to the interests of justice, the order will be accompanied by a memorandum setting forth the factual determinations on which it is based and the reasons for the council action. The memorandum will not include the name of the complainant or of the judge whose conduct was complained about. The order and the supporting memorandum will be provided to the complainant, the judge, and any judge entitled to receive a copy of the complaint pursuant to rule 3(a)(2). However, if the complaint has been referred to the Judicial Conference of the United States pursuant to paragraph (e) of this rule and the council determines that disclosure would be contrary to the interests of justice, such disclosure need not be made. The complainant and the judge will be notified of any right to seek review of the judicial council's decision by the Judicial Conference of the United States and of the procedure for filing a petition for review.

(j) Public availability of council action. Materials related to the council's action will be made public at the time and in the manner set forth in rule 17.

(k) Allegations of criminal conduct. If a judicial council dismisses, solely for lack of jurisdiction under 28 U.S.C. § 372(c), non-frivolous allegations of criminal conduct by a judge, the judicial council's order of dismissal shall inform the complainant that the dismissal does not prevent the complainant from bringing any allegation of criminal conduct to the attention of appropriate federal or state criminal authorities. If, in this situation, the allegations of criminal conduct were originally referred to the circuit by a Congressional committee or member of Congress, the judicial council _ if no petition for review of the dismissal by the Judicial Conference lies under 28 U.S.C. § 372(c)(10), or if no petition for review is filed _ shall notify the Congressional committee or member that the Judiciary has concluded that it lacks jurisdiction under § 372(c).

Commentary on Rule 14

Basis of Council Action

Section 372(c)(6)(A) states that, upon receipt of a report from a special committee, the judicial council may conduct any additional investigation that it considers to be necessary. While the statute does not explicitly refer to an authority to ask the special committee to do further work and file a supplemental

report, it appears to us that such a procedure is so inherently a part of a committee process that the authority for it may safely be assumed. In our view, an investigation of any magnitude by the entire judicial council would be warranted in only the rarest cases, since it would constitute a substantial drain on judicial resources of the circuit. There may be some cases, however, in which a loose end can be tied up without the necessity of a remand.

Council Action

Paragraphs (6)(B), 6(C) and (7) of section 372(c) enumerate actions that the council may take after receipt of the report of a special committee and the conduct of any additional investigation that it deems necessary. There are two notable omissions from this statutory enumeration: conclusion of the proceedings on the ground that corrective action has been taken, and conclusion of the proceedings on the ground that action on the complaint is no longer necessary because of intervening events. Moreover, the authority to take these actions does not easily fit into the catch-all clause of paragraph (6)(B)(vii) ("ordering such other action as it considers appropriate under the circumstances"), since the general introductory language of paragraph (6)(B) seems to assume that a finding of misconduct or disability has been made. That language authorizes the judicial council to "take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit." We nevertheless conclude that conclusion of the proceeding on the basis of corrective action taken and conclusion of the proceeding because intervening events have made action on the complaint unnecessary must be considered action permitted under paragraph (6)(B)(vii). In these rules, they are included in the enumerated alternatives for council action.

Combination of Actions

Rule 14(g) states that referral of a complaint to the Judicial Conference of the United States, or to a district court in a case involving a magistrate judge, will not preclude the judicial council from simultaneously taking other action to assure the effective and expeditious administration of the business of the courts.

Referral to the Judicial Conference of the United States may take place under either clause (A) or clause (B) of section 372(c)(7). Clause (A) states that, "[i]n addition to the authority [to take appropriate action] granted under paragraph (6)," judicial councils may, in their discretion, refer matters to the Judicial Conference of the United States with recommendations for action by the Conference. Clause (B) mandates judicial council referral of complaints to the Judicial Conference in certain circumstances; it is not introduced with the phrase, "In addition to the authority granted under paragraph (6)." We do not believe that this distinction in the introductory language was intended to suggest a difference in the authority of the judicial council to take corrective action simultaneously with referral of a matter to the Conference. We read "In addition to" in clause (A) as saying no more than that referral is another action within the council's authority, in addition to those actions listed in paragraph (6).

Attorneys' Fees

Section 372(c)(16), as amended by § 402(h) of the Judicial Discipline and Removal Reform Act of 1990, makes explicit the authority of the judicial council, upon the request of the judge who is the subject of the complaint, to recommend to the Director of the Administrative Office of the United States Courts that the judge who is the subject of the complaint be reimbursed for reasonable expenses, including attorneys' fees, incurred during the investigation. Under the statutory provision, the judicial council has the authority to recommend such reimbursement only where, after investigation by a special committee, the complaint has been finally dismissed under § 372(c)(6)(C). The statute confers upon the judicial council no such authority where the council instead takes any other action available to it under paragraphs 6(B) or 7 of section 372(c). Accordingly, there is no basis in the statute for a recommendation of reimbursement for attorneys' fees where the judicial council, after an investigation, concludes the proceeding under § 372(c)(6)(B)(vii) on the ground that corrective action has been taken or that intervening events have made action on the complaint unnecessary.

Notice of Council Action

Rule 14(i) requires that council action normally be supported with a memorandum of factual determinations and reasons and that notice of the action be given to the complainant and the judge complained about. The two "interests of justice" exceptions are derived from 28 U.S.C. § 372(c)(7)(C) and (c)(15). It is not easy to imagine cases in which they would be applicable.

Right to Petition for Review of Judicial Council Action

Rule 14(i) requires that the notification to the complainant and the judge complained about include notice of any right to petition the Judicial Conference of the United States for review of the council's decision.

It is noted that the right to petition for review is limited to orders under paragraph (6) of section 372(c). A decision of the council to refer a matter to the Judicial Conference under paragraph (7) is not reviewable.

Last Modified - Thursday Jan 02, 2003

Back to Graphical Site

The Guide - Volume 3

EXHIBIT B-1: ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY

Chapter 5: Judicial Council Consideration of Recommendations of Special Committee

RULE 15. PROCEDURES FOR JUDICIAL COUNCIL CONSIDERATION OF A SPECIAL COMMITTEE'S REPORT

(a) Rights of judge complained about. Within ten days after the filing of the report of a special committee, the judge complained about may address a written response to all of the members of the judicial council. The judge will also be given an opportunity to present oral argument to the council, personally or through counsel. The judge may not communicate with individual council members about the matter, either orally or in writing.

(b) Conduct of additional investigation by the council. If the judicial council decides to conduct additional investigation, the judge complained about will be given adequate prior notice in writing of that decision and of the general scope and purpose of the additional investigation. The conduct of the investigation will be generally in accordance with the procedures set forth in rules 10 through 13 for the conduct of an investigation by a special committee. However, if hearings are held, the council may limit testimony to avoid unnecessary repetition of testimony presented before the special committee.

(c) Voting. Council action will be taken by a majority of those members of the council who are not disqualified, except that a decision to remove a bankruptcy judge from office requires a majority of all the members of the council.

Commentary on Rule 15

Voting

Section 372(c)(6)(B)(vii) requires that removal of a bankruptcy judge be in accordance with 28 U.S.C. § 152. Subsection (e) of that section requires the concurrence of a majority of all the members of the council in the order of removal. We do not think it is appropriate to apply a similar rule to the less severe actions that a judicial council may take under the act. If some members of the council are disqualified in the matter, their disqualification should not be given the effect of a vote against council action.

Last Modified - Thursday Jan 02, 2003

Back to Graphical Site

The Guide - Volume 3
EXHIBIT B-1: ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY
Chapter 6: Miscellaneous Rules

RULE 16. CONFIDENTIALITY

(a) General rule. Consideration of a complaint by the chief judge, a special committee, or the judicial council will be treated as confidential business, and information about such consideration will not be disclosed by any judge or employee of the judicial branch or any person who records or transcribes testimony except in accordance with these rules.

(b) Files. All files related to complaints of misconduct or disability, whether maintained by the clerk, the chief judge, members of a special committee, members of the judicial council, or staff, and whether or not the complaint was accepted for filing, will be maintained separate and apart from all other files and records, with appropriate security precautions to ensure confidentiality.

(c) Disclosure in memoranda of reasons. Memoranda supporting orders of the chief judge or the judicial council, and dissenting opinions or separate statements of members of the council, may contain such information and exhibits as the authors deem appropriate, and such information and exhibits may be made public pursuant to rule 17.

(d) Availability to Judicial Conference. In the event that a complaint is referred under rule 14(e) to the Judicial Conference of the United States, the clerk will provide the Judicial Conference with copies of the report of the special committee and any other documents and records that were before the judicial council at the time of its determination. Upon request of the Judicial Conference or its Committee to Review Circuit Council Conduct and Disability Orders, in connection with their consideration of a referred complaint or a petition under 28 U.S.C. § 372(c)(10) for review of a council order, the clerk will furnish any other records related to the investigation.

(e) Availability to district court. In the event that the judicial council directs the initiation of proceedings for removal of a magistrate judge under rule 14(f)(3), the clerk will provide to the chief judge of the district court copies of the report of the special committee and any other documents and records that were before the judicial council at the time of its determination. Upon request of the chief judge of the district court, the judicial council may authorize release of any other records relating to the investigation.

(f) Impeachment proceedings. The judicial council may release to the legislative branch any materials that are believed necessary to an impeachment investigation of a judge or a trial on articles of impeachment.

(g) Consent of judge complained about. Any materials from the files may be disclosed to any person upon the written consent of both the judge complained about and the chief judge of the circuit. In any disclosure the chief judge may require that the identity of the complainant, or of witnesses in an investigation conducted by a special committee or the judicial council, be shielded.

(h) Disclosure by judicial council in special circumstances. The judicial council may authorize disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to the extent that the council concludes that such disclosure is justified by special circumstances and is not prohibited by 28 U.S.C. § 372(c)(14).

Such disclosure may be made to Judiciary researchers engaged in the study or evaluation of experience under 28 U.S.C. § 372(c) and related modes of judicial discipline, but only where such study or evaluation has been specifically approved by the Judicial Conference or by the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders. The judicial council should take appropriate steps (to the extent the Judicial Conference or its Committee has not already

done so) to shield the identities of the judge complained against, the complainant, and witnesses from public disclosure, and may impose other appropriate safeguards to protect against the dissemination of confidential information.

(i) Disclosure of identity by judge complained about. Nothing in this rule will preclude the judge complained about from acknowledging that he or she is the judge referred to in documents made public pursuant to rule 17.

(j) Assistance and consultation. Nothing in this rule precludes the chief judge or judicial council, for purposes of acting on a complaint filed under 28 U.S.C. § 372(c), from seeking the assistance of qualified staff, or from consulting other judges who may be helpful in the process of complaint disposition.

Commentary on Rule 16

Scope of Confidentiality Requirement

Section 372(c)(14) applies a rule of confidentiality to "papers, documents, and records of proceedings related to investigations conducted under this subsection" and states that they shall not be disclosed "by any person in any proceeding," with enumerated exceptions. Three questions arise: Who is bound by the confidentiality rule, what proceedings are subject to the rule, and who is within the circle of people who may have access to information without breaching the rule?

With regard to the first question, rule 16(a) provides that judges, employees of the judicial branch, and people involved in recording proceedings and preparing transcripts are obliged to respect the confidentiality requirement. This of course includes judges who may be the subjects of complaints.

With regard to the second question, the reference to "investigations" suggests that section 372(c)(14) technically applies only in cases in which a special committee has been appointed. However, rule 16 (a) applies the rule of confidentiality more broadly, covering consideration of a complaint at any stage.

With regard to the third question, it seems clear that there is no barrier of confidentiality between a judicial council and the Judicial Conference, and that members of the Judicial Conference or its standing committee may have access to any of the confidential records for use in their consideration of a referred matter or a petition for review. We regard it as implicit that a district court may have similar access if the judicial council orders in response to a complaint that the district court initiate proceedings to remove a magistrate judge from office, and rule 16(e) so provides. It would be absurd if the district court were in this circumstance denied access to the evidence on which the order was based.

The confidentiality requirement does not, of course, prevent the chief judge from "communicat[ing] orally or in writing with . . . people who may have knowledge of the matter," rule 4(b), as part of a limited inquiry conducted by the chief judge under that rule.

In addition, we find it implicit that chief judges and judicial councils may seek staff assistance or consult with other judges who may be helpful in the process of complaint disposition. Rule 16(j) provides that the confidentiality requirement does not preclude this. *See National Commission Report* at 103 (finding that "[t]he Act, including its provision on confidentiality, does not constitute a barrier to such assistance or consultation"). The chief judge, for example, may properly seek the advice and assistance of another judge whom the chief judge deems to be in the best position to speak with the judge named in the complaint in an attempt to bring about corrective action to remedy the problem raised in the complaint. As another example, a new chief judge may wish to confer with a predecessor to learn how similar complaints have been handled. In consulting with other judges, of course, the chief judge should disclose information regarding the complaint only to the extent the chief judge deems necessary under the circumstances.

On the other hand, the statute makes it clear that there is a barrier of confidentiality between the

judicial branch and the legislative; it provides, as an exception to the rule of confidentiality, that material is to be disclosed to Congress only if it is "believed necessary to an impeachment investigation or trial of a judge under article I."

Exceptions to Confidentiality Rule

With regard to the exception for impeachment proceedings, rule 16(f) tracks the statutory language, and deliberately preserves the ambiguity about who must believe that disclosure is necessary to an impeachment investigation or trial. There is some possibility of conflict between the legislative and judicial branches about this issue. It may never arise in fact, and it does not seem appropriate to try to resolve it in advance by rule.

Another exception to the rule of confidentiality is provided by section 372(c)(14)(B), which states that confidential materials may be disclosed if authorized in writing by the judge complained about and by the chief judge of the circuit.

Rule 16 also recognizes that there must be some implicit exceptions to the confidentiality requirement. For example, 28 U.S.C. § 372(c)(15) requires that certain orders and the reasons for them shall be made public; it would be a barren collection of reasons that could not refer to the evidence. Rule 16(c) thus makes it explicit that memoranda supporting chief judge and council orders, as well as dissenting opinions and separate statements, may contain references to information that would otherwise be confidential and that such information may be made public.

Rule 16(h) permits disclosure of additional information by order of the council in circumstances not enumerated. Unfortunately, the statutory language does not explicitly authorize exceptions, so many cases will present issues of statutory interpretation. A strong case could be made for disclosure to permit a prosecution for perjury based on testimony given before a special committee. A more difficult case would be presented if a special committee turned up evidence of criminal conduct by a judge and wanted to refer the matter to a grand jury. The rule refers to the statutory prohibition but does not attempt to resolve such questions.

Rule 16(h) specifically permits the judicial council to authorize disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to Judiciary researchers engaged in the study or evaluation of experience under 28 U.S.C. § 372(c) and related modes of judicial discipline. This provision responds to the recommendation of the National Commission on Judicial Discipline and Removal that council rules should authorize the "release [of] information, with appropriate safeguards, to government entities or properly accredited individuals engaged in the study or evaluation of experience under the 1980 Act." *National Commission Report* at 108.

The rule envisions disclosure of information from the official record of complaint proceedings to a limited category of persons for appropriately authorized research purposes only, and with appropriate safeguards to protect individual identities in any published research results that ensue. In authorizing disclosure, the judicial council may refuse to release particular materials whose release would be contrary to the interests of justice, or that constitute purely internal communications. The rule does not envision any disclosure of purely internal communications between judges and their colleagues and staff.

Disclosure of Materials Upon Consent

Once the judge complained about has consented to the disclosure of confidential materials pursuant to section 372(c)(14)(C) and rule 16(g), the chief judge ordinarily will refuse consent only to the extent necessary to protect the confidentiality interests (1) of the complainant or (2) of witnesses who have testified in investigatory proceedings or who have provided information in response to a limited inquiry undertaken pursuant to rule 4(b). It will generally be necessary, therefore, for the chief judge to require that the identities of the complainant or of such witnesses, as well as any identifying information, be shielded in any materials disclosed, except insofar as (1) the chief judge has secured the consent of the complainant or of a particular witness to disclosure, or (2) there is a demonstrated need for

disclosure of the information that, in the judgment of the chief judge, outweighs the confidentiality interest of the complainant or of a particular witness (as may be the case where the complaint was delusional or where the complainant or a particular witness has already demonstrated a lack of concern about maintaining the confidentiality of the proceedings).

Last Modified - Thursday Jan 02, 2003

The Guide - Volume 3 Back to Graphical Site

EXHIBIT B-1: ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY

Chapter 6: Miscellaneous Rules

RULE 17. PUBLIC AVAILABILITY OF DECISIONS

(a) General rule. A docket-sheet record of orders of the chief judge and the judicial council and the texts of any memoranda supporting such orders and any dissenting opinions or separate statements by members of the judicial council will be made public when final action on the complaint has been taken and is no longer subject to review.

(1) If the complaint is finally disposed of without appointment of a special committee, or if it is disposed of by council order dismissing the complaint for reasons other than mootness or because intervening events have made action on the complaint unnecessary, the publicly available materials will not disclose the name of the judge complained about without his or her consent.

(2) If the complaint is finally disposed of by censure or reprimand by means of private communication, the publicly available materials will not disclose either the name of the judge complained about or the text of the reprimand.

(3) If the complaint is finally disposed of by any other action taken pursuant to rule 14(d) or (f) except dismissal because intervening events have made action on the complaint unnecessary, the text of the dispositive order will be included in the materials made public, and the name of the judge will be disclosed.

(4) If the complaint is dismissed as moot, or because intervening events have made action on the complaint unnecessary, at any time after the appointment of a special committee, the judicial council will determine whether the name of the judge is to be disclosed.

The name of the complainant will not be disclosed in materials made public under this rule unless the chief judge orders such disclosure.

(b) Manner of making public. The records referred to in paragraph (a) will be made public by placing them in a publicly accessible file in the office of the clerk of the court of appeals at [address]. The clerk will send copies of the publicly available materials to the Federal Judicial Center, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, D.C. 20002, where such materials will also be available for public inspection. In cases in which memoranda appear to have precedential value, the chief judge may cause them to be published.

(c) Decisions of Judicial Conference standing committee. To the extent consistent with the policy of the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders, opinions of that committee about complaints arising from this circuit will also be made available to the public in the office of the clerk of the court of appeals.

(d) Complaints referred to the Judicial Conference of the United States. If a complaint is referred to the Judicial Conference of the United States pursuant to rule 14(e), materials relating to the complaint will be made public only as may be ordered by the Judicial Conference.

Commentary on Rule 17

Section 372(c)(15) provides that "[e]ach written order to implement any action under paragraph (6)(B) of this subsection" shall be made publicly available and that, "[u]nless contrary to the interest of justice," each such order shall be accompanied by written reasons. Section 372(c)(14) states that "papers, documents, and records of proceedings related to investigations" shall be confidential.

Section 372(c)(6)(B) lists, among possible council actions following an investigation, censure or reprimand "by means of private communication" or "by means of public announcement." These three provisions exhaust the statutory guidance with respect to public availability of decisions on complaints.

The statute and its legislative history exhibit a strong policy goal of protecting judges from the damage that could be done by publicizing unfounded allegations of misconduct. Except in cases in which the proposed Court on Judicial Conduct and Disability held a de novo hearing, the Senate- passed bill specifically provided for confidentiality at all stages of the complaint procedure "unless final adverse action is taken against a judge, not including an order of dismissal."(10) Although the language of the final legislation is derived from the House bill(11) and is limited to materials "related to investigations," there is no indication that nonconfidential treatment of other materials was contemplated.

We believe that it is consistent with the congressional intent to protect a judge from public disclosure of a complaint, both while it is pending and after it has been dismissed if that should be the outcome. On the other hand, the goal of assuring the public that the disciplinary mechanism is operating satisfactorily is better served by making the process more open. *See National Commission Report* at 106-07. Perhaps even more important, publication of some of the chief judges' dismissal orders - as contrasted with mere public availability - would surely improve the operation of the mechanism. For the most part, the fifteen chief judges with responsibility under this statute have been making decisions about issues under the statute quite unaware of how the same or similar issues have been treated in other circuits and without the benefit that flows from scholarly critique. A body of published precedent can only be helpful to us all. *See id.* at 109.

Rule 17 attempts to accommodate these conflicting interests. *See id.* at 107 ("the Illustrative Rules strike an appropriate balance between conflicting policies" concerning confidentiality). It provides for public availability of decisions of the chief judge and the judicial council, and the texts of any memoranda supporting their orders, together with any dissenting opinions or separate statements by members of the judicial council. However, these orders and memoranda are to be made public only when final action on the complaint has been taken and any right of review has been exhausted. Whether the name of the judge is disclosed will then depend upon the nature of the final action. If the final action is an order predicated on a finding of misconduct or disability (other than censure or reprimand by means of private communication) the name of the judge will be made public. If the final action is dismissal of the complaint, or a conclusion of the proceeding by the chief judge on the basis of corrective action taken, the name of the judge will not be disclosed.

If a complaint is dismissed as moot, or because intervening events have made action on the complaint unnecessary, after appointment of a special committee, rule 17(a)(4) leaves it to the judicial council to determine whether the judge will be identified. In such a case, no final decision has been reached on the merits, but it may be in the public interest - particularly if a judicial officer resigns in the course of an investigation - to make the identity of the judge known.

It should be noted that rule 17 provides for apparently inconsistent treatment where a proceeding is concluded on the basis of corrective action taken. If a chief judge concludes a proceeding on that basis, rule 17(a)(1) provides that the name of the judge will not be disclosed. Shielding the name of the judge in this circumstance should contribute to the frequency of this kind of informal disposition. Once a special committee has been appointed, and a proceeding is concluded by the full council on the basis of corrective action taken, rule 17(a)(3) provides for disclosure of the name of the judge. An "informal" resolution of the complaint at this stage is likely to look very much like any other council order, and should be disclosed in the same manner.

The proposal that decisions be made public only after final action has been taken is designed in part to avoid disclosure of the existence of pending proceedings.

We note that public availability of orders under 28 U.S.C. § 372(c)(6)(B) is a statutory requirement. The statute does not prescribe the time at which these orders must be made public, and it might be thought implicit that it should be without delay. Similarly, the statute does not state whether the name of the judge must be disclosed, but it could be argued that such disclosure is implicit. In view of the legislative interest in protecting a judge from public airing of unfounded charges, we think the law is

reasonably interpreted as permitting nondisclosure of the identity of a judicial officer who is ultimately exonerated and also permitting delay in disclosure until the ultimate outcome is known. We note in this connection that congressional leaders described the public availability requirement as applying to "sanctioning orders."[(12)]

Finally, the rule provides that the identity of the complainant will be disclosed only if the chief judge so orders. Identifying the complainant when the judge is not identified would of course increase the likelihood that the identity of the judge would become publicly known, thus thwarting the policy of nondisclosure. If the identity of the complainant is not to be made public in such cases, we see no particular reason to change the rule and make it public routinely in cases in which the judge is identified. However, it may not always be practicable to shield the complainant's identity while making public disclosure of the judicial council's order and supporting memoranda; in some circumstances, moreover, the complainant may consent to public identification.

[(10)] S. 1873, 96th Cong., 1st Sess. § 2(a) (1979) (proposed 28 U.S.C. § 372(n)(1)(C)); *see* S. Rep. No. 362, 96th Cong., 1st Sess. 16 (1979).

[(11)]H.R. 7974, 96th Cong., 2d Sess. § 3(a) (1980) (proposed 28 U.S.C. § 372(c)(14)).

[(12)]126 Cong. Rec. 28,093 (1980) (remarks of Sen. DeConcini); *id.* at 28,617 (remarks of Rep. Kastenmeier).

Last Modified - Thursday Jan 02, 2003

EXHIBIT B-1: ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY

RULE 18. DISQUALIFICATION

(a) Complainant. If the complaint is filed by a judge, that judge will be disqualified from participation in any consideration of the complaint except to the extent that these rules provide for participation by a complainant. A chief judge who has identified a complaint under rule 2(j) will not be automatically disqualified from participating in the consideration of the complaint but may consider in his or her discretion whether the circumstances warrant disqualification.

(b) Judge complained about. A judge whose conduct is the subject of a complaint will be disqualified from participating in any consideration of the complaint except to the extent that these rules provide for participation by a judge who is complained about.

(c) Disqualification of chief judge on consideration of a petition for review of a chief judge's order. If a petition for review of a chief judge's order dismissing a complaint or concluding a proceeding is filed with the judicial council pursuant to rule 5, the chief judge will not participate in the council's consideration of the petition. In such a case, the chief judge may address a written communication to all of the members of the judicial council, with copies provided to the complainant and to the judge complained about. The chief judge may not communicate with individual council members about the matter, either orally or in writing.

(d) Member of special committee not disqualified. A member of the judicial council who is appointed to a special committee will not be disqualified from participating in council consideration of the committee's report.

(e) Judge under investigation. Upon appointment of a special committee, the judge complained about will automatically be disqualified from serving on (1) any special committee appointed under rule 4(e), (2) the judicial council of the circuit, (3) the Judicial Conference of the United States, and (4) the Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States. The disqualification will continue until all proceedings regarding the complaint are finally terminated, with no further right of review.

(f) Substitute for disqualified chief judge. If the chief judge of the circuit is disqualified from participating in consideration of the complaint, the duties and responsibilities of the chief judge under these rules will be assigned to the circuit judge in regular active service who is the most senior in date of commission of those who are not disqualified. If all circuit judges in regular active service are disqualified, the judicial council may determine whether to refer the complaint to a circuit judge from another circuit pursuant to 28 U.S.C. § 291(a), or whether it is necessary, appropriate, and in the interest of sound judicial administration to permit the chief judge to dispose of the complaint on the merits. Members of the judicial council who are named in the complaint may participate in this determination if necessary to obtain a quorum of the judicial council.

(g) Judicial council action where multiple judges are disqualified. Notwithstanding any other provision in these rules to the contrary, a member of the judicial council who is a subject of the complaint may participate in the disposition thereof if (a) participation by members who are subjects of the complaint is necessary to obtain a quorum of the judicial council, and (b) the judicial council votes that it is necessary, appropriate and in the interest of sound judicial administration that such complained-against members be eligible to act. Members of the judicial council who are subjects of the complaint may participate in this determination if necessary to obtain a quorum of the judicial council. Under no circumstances, however, shall the judge who acted as chief judge of the circuit in ruling on the complaint under rule 4 be permitted to participate in this determination.

Commentary on Rule 18

Disqualification of Chief Judge on Review of Chief Judge's Order

Whether the chief judge should participate in decisions on petitions to the circuit council is a question that has engendered some disagreement. Rule 18(c) would bar such participation. We believe that such a policy is best calculated to assure complainants that their petitions will receive fair consideration.

Substitute for Disqualified Chief Judge

Under 28 U.S.C. § 372(c)(2), a complaint against the chief judge is to be handled by "that circuit judge in regular active service next senior in date of commission." This language is read in some circuits as requiring that the substitute judge be junior "in date of commission" to the chief judge; in others it is read as simply a statement that seniority among judges other than the chief is to be determined by date of commission, with the result that complaints against the chief judge may be routed to a former chief judge or other judge who was appointed earlier than the chief judge. Although the former interpretation probably has a slight grammatical edge, rule 18(f) adopts the latter. We are aware of no evidence that Congress intended to depart from the normal order of precedence.

These rules do not purport to prescribe who is to preside over meetings of the judicial council. Consequently, where the presiding member of the judicial council is disqualified from participating under these rules, the order of precedence prescribed by rule 18(f) for performing "the duties and responsibilities of the chief judge under these rules" does not apply to determine the acting presiding member of the judicial council. That is a matter left to the internal rules or operating practices of each judicial council. In most cases, we believe, the most senior active circuit judge who is a member of the judicial council and who is not disqualified will preside.

Disqualification When Multiple Judges Are Complained Against

Sometimes a single complaint is filed against a large group of judges. Complaints have been filed against all the members of the court of appeals and at least one has been filed against all circuit and district court judges of the circuit. If the normal disqualification rules are observed in the former case, no court of appeals judge can serve as acting chief judge of the circuit, and the judicial council will be without appellate members. In the latter case _ where the complaint is against all circuit and district judges _ no member of the judicial council can perform the duties assigned to the council under the statute.

A similar problem is created by successive complaints arising out of the same underlying grievance. For example, a complainant files a complaint against a district judge based on alleged misconduct, and the complaint is dismissed by the chief judge under the statute. The complainant may then file a complaint against the chief judge for dismissing the first complaint, and when that complaint is dismissed by the next senior judge, still a third complaint is filed. The threat is that the complainant will bump down the seniority ladder until, once again, there is no member of the court of appeals who can serve as acting chief judge for the purpose of the next complaint. In somewhat similar circumstances, the Judicial Council of the Third Circuit, with barely a quorum of qualified judges, ordered a complainant to show cause why he should not be enjoined from filing repetitive and frivolous complaints.[13]

With recognition that these multiple-judge complaints are virtually always meritless, we have concluded that the judicial council should be accorded authority to determine (1) whether it is necessary, appropriate, and in the interest of sound judicial administration to permit the chief judge to dispose of a complaint where it would otherwise be impossible for any active circuit judge in the circuit to act, and (2) whether it is necessary, appropriate, and in the interest of sound judicial administration to permit complained-against members of the judicial council to participate in the disposition of a petition for review where it would otherwise be impossible to obtain a quorum.

We do not believe that any reasonable observer will view invocation of a rule of necessity in these

situations to be inconsistent with the appearance of justice. *See, e.g., In re Complaint of Doe*, 2 F.3d 308 (8th Cir. Jud. Council 1993) (invoking the rule of necessity); *In re Complaint of Judicial Misconduct*, No. 91-80464 (9th Cir. Jud. Council 6/24/92) (same); *National Commission Report* at 105. There is no unfairness in permitting the chief judge to dispose of a patently insubstantial complaint that names all active circuit judges in the circuit. The remaining option is to use intercircuit assignment procedures under 28 U.S.C. § 291(a) to assign a circuit judge from another circuit to perform the statutory duties of the chief judge. Given the administrative inconvenience and delay involved in this alternative, we have concluded that it is desirable to use intercircuit assignment procedures only if the judicial council determines that the complaint is substantial enough to warrant such action.

Similarly, there is no unfairness in permitting complained-against judges, in these circumstances, to participate in the review of a chief judge's dismissal of an insubstantial complaint. The remaining option is to assign the matter to another body. Among other alternatives, the council might ask the judicial council of another circuit to consider the petition or might ask the Chief Justice to assign the matter to either the judicial council of another circuit or the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders. Given the administrative inconvenience and delay involved in these alternatives, we have concluded that it is desirable to refer the petition to another body only if the judicial council determines that the petition is substantial enough to warrant such action.

In the unlikely event that a quorum of the judicial council cannot be obtained to consider the report of a special committee, it would normally be necessary to refer the matter to another body. There is legislative history suggesting that in such a circumstance the council should use the authority provided in section 372(c)(7)(A) to refer the complaint to the Judicial Conference for consideration.[14]

[13] *In re* Silo (3d Cir. Jud. Council, Aug. 18, 1983).

[14] H.R. Rep. No. 1313, 96th Cong., 2d Sess. 12 (1980).

Last Modified - Thursday Jan 02, 2003

The Guide - Volume 3 Back to Graphical Site

EXHIBIT B-1: ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY

Chapter 6: Miscellaneous Rules

RULE 19. WITHDRAWAL OF COMPLAINTS AND PETITIONS FOR REVIEW

(a) Complaint pending before chief judge. A complaint that is before the chief judge for a decision under rule 4 may be withdrawn by the complainant with the consent of the chief judge.

(b) Complaint pending before special committee or judicial council. After a complaint has been referred to a special committee for investigation, the complaint may be withdrawn by the complainant only with the consent of both (1) the judge complained about and (2) the special committee (before its report has been filed) or the judicial council.

(c) Petition for review of chief judge's disposition. A petition to the judicial council for review of the chief judge's disposition of a complaint may be withdrawn by the petitioner at any time before the judicial council acts on the petition.

Commentary on Rule 19

Rule 19 treats the complaint proceeding, once begun, as a matter of public business rather than as the property of the complainant. The complainant is denied the unrestricted power to terminate the proceeding by withdrawing the complaint.

Under rule 19(a), a complaint pending before the chief judge may be withdrawn if the chief judge consents. In appropriate cases, the chief judge may accordingly be saved the burden of preparing a formal order and supporting memorandum.

If the chief judge appoints a special committee, however, rule 19(b) provides that the complaint may be withdrawn only with the consent of both the body before which it is pending (the special committee or the judicial council) and the judge complained about. Once a complaint has reached the stage of appointment of a special committee, the complainee is thus given the right to insist that the matter be resolved on the merits, thereby escaping the ambiguity that might remain if the proceeding were terminated by withdrawal of the complaint.

With regard to petitions for judicial council review, rule 19(c) grants the petitioner unrestricted authority to withdraw the petition. It is thought that the public's interest in the proceeding is adequately protected, since there will necessarily have been a decision by the chief judge in such a case.

Last Modified - Thursday Jan 02, 2003

The Guide - Volume 3 Back to Graphical Site

EXHIBIT B-1: ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY

Chapter 6: Miscellaneous Rules

RULE 20. AVAILABILITY OF OTHER PROCEDURES

The availability of the complaint procedure under these rules and 28 U.S.C. § 372(c) will not preclude the chief judge of the circuit or the judicial council of the circuit from considering any information that may come to their attention suggesting that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or is unable to discharge all the duties of office by reason of disability.

Commentary on Rule 20

Rule 20 reflects the fact that the enactment of section 372(c) was not intended to displace the historic functions of the chief judge and the circuit judicial council to respond to problems that come to their attention. As stated by Senator DeConcini in his remarks upon final Senate passage of the 1980 act, "the informal, collegial resolution of the great majority of meritorious disability or disciplinary matters is to be the rule rather than the exception. Only in the rare case will it be deemed necessary to invoke the formal statutory procedures and sanctions provided for in the act."[(15)] The National Commission on Judicial Discipline and Removal found that "[i]nformal approaches remain central to the system of self-regulation within the judiciary. . . . And a major benefit of the Act's formal process has been to enhance the attractiveness of informal resolutions." *National Commission Report* at 113.

[(15)] 126 Cong. Rec. 28,092 (1980).

Last Modified - Thursday Jan 02, 2003

The Guide - Volume 3

Back to Graphical Site

EXHIBIT B-1: ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY

Chapter 6: Miscellaneous Rules

RULE 21. AVAILABILITY OF RULES AND FORMS

These rules and copies of the complaint form prescribed by rule 2 will be available without charge in the office of the clerk of the court of appeals [address] and in each office of the clerk of a district court or bankruptcy court within this circuit.

Last Modified - Thursday Jan 02, 2003

The Guide - Volume 3 Back to Graphical Site

EXHIBIT B-1: ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY

Chapter 6: Miscellaneous Rules

RULE 22. EFFECTIVE DATE

These rules apply to complaints filed on or after ____[date]____[the date the new rules are promulgated]. The handling of complaints filed before that date will be governed by the rules previously in effect.

Last Modified - Thursday Jan 02, 2003

The Guide - Volume 3

Back to Graphical Site

EXHIBIT B-1: ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY

Chapter 6: Miscellaneous Rules

RULE 23. ADVISORY COMMITTEE

The advisory committee appointed by the Court of Appeals for the ___th Circuit for the study of rules of practice and internal operating procedures shall also constitute the advisory committee for the study of these rules, as provided by 28 U.S.C. § 2077(b), and shall make any appropriate recommendations to the circuit judicial council concerning these rules.

Last Modified - Thursday Jan 02, 2003